88-1691

Supreme Court, U.S.
FILED
APR 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1988

STERLING DRUG INC.,

Petitioner,

v.

CIRCUIT COURT FOR MILWAUKEE, THE HONORABLE GARY A. GERLACH, JUDGE, PRESIDING, JACQUELINE FOX, A MINOR, BY HER GUARDIAN AD LITEM, ROBERT L. HABUSH, GARY FOX, AND JUDITH FOX,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN OR, ALTERNATIVELY, FOR WRIT OF MANDAMUS

Michael J. Bonesteel
Robert L. Kaufman
Counsel of Record
in pro hac vice
HAIGHT, BROWN & BONESTEEL
201 Santa Monica Boulevard
Post Office Box 680
Santa Monica, California 90406
Telephone: (213) 458-1000

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTIONS PRESENTED

1. Does a corporation, through its employees and agents, have a right to due process and a first amendment right to due process and a first amendment right to associate and speak freely with other members of the same trade association, and with its own employees, attorneys, and selected expert consultants without fear that those communications will be turned over to its legal adversary?

2. Does the trial court violate defendant's right to due process of law by allowing discovery of communications and documents relating to a corporation's investigation and assessment of potential civil and regulatory litigation, denying defendant the protection of the attorney/client and work product privileges?

3. Does the trial court violate defendant's right to due process of law in ruling that documents which are indisputably privileged in one action are suddenly bereft of protection from discovery in a second action involving the same product, type of injury, and defenses, merely because the first action has been resolved?

4. Does the a court violate defendant's first amendment rights to petition the federal government and to free speech by allowing discovery of communications and documents which are not in the public domain, and which relate to petitioning activities, especially where the government has a compelling interest in preservation of frank and unfettered nature of such activities?

Petitioner submits that all the above questions must be answered affirmative. Otherwise, this Court would sanction discrimination against and denial of constitutional protections to a selected class of legal entities, based solely upon corporate status and perceived wealth.

LIST OF PARTIES

The parties to these proceedings are petitioner, defendant Sterling Drug Inc., and respondents, plaintiffs Jacqueline Fox (by her guardian ad litem, Robert L. Habush), Gary Fox, and Judith Fox. Other named defendants in the trial court are ABC Insurance Company (a fictitious corporation), Red Cross Pharmacy, Inc. (a Wisconsin corporation), and DEF Insurance Company (a fictitious corporation).

On appeal, the trial judge, the Hon. Gary A. Gerlach, was named as a party, since his order was challenged through a petition for a supervisory writ in both the court of appeals and supreme court by this petitioner and/or the Aspirin Foundation of America.

The Aspirin Foundation of America ("AFA" or "Foundation") was not named as a defendant by respondents/plaintiffs, but sought and received leave to intervene for the first time in the court of appeals. In the Wisconsin Supreme Court, the Foundation filed a petition for review.

RULE 28.1 LIST

Pursuant to Rule 28.1, the parent companies, affiliates and subsidiaries, excluding wholly owned subsidiaries, of petitioner Sterling Drug Inc. are:

Eastman Kodak Company,
Sterling Products Indonesia
Yamanouchi Pharmaceutical, Inc.
Dainhiseika Sterling Co. Ltd.,

Imrock Chemical Co. Ltd.,
Sterling Products Limited (Ghana)
Sterling Drugs Korea Ltd.
Sterling Products Nigeria Ltd.
Sterling Pakistan Private Ltd.
Mackwoods-Winthrop Limited
Miller Bros. Limited
Hall & Company Limited
Photofinishers (Glasgow) Limited
Reflex Photo Works Limited
Roll Film Company Limited
Taylors Dev. & Printing Works Limited
Pinnacle Systems Inc.
Wilson & George Meyer
Stuart Photo Services Limited
Consumer Developments Limited
City Photo Limited
Ordinant S.A.R.L.
Verbatim Commercial Limited
Data Technology Corporation
Sun Microsystems, Inc.
Chinon Industries Inc.
Cytogen Inc.
Carizon Inc.
Oryx
NeoRx Corporation
Nippon Systems
Enzon Inc.
Imagica
Genencor Inc.
Imunex Inc.
Seaga
Qualex Inc.

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OPINIONS BELOW

The opinion of the Wisconsin Circuit Court has not been reported. The order is reprinted in the appendix to this petition, at pages A-20 through A-23. The order of the Wisconsin Court of Appeals denying leave to appeal is reprinted in the appendix, at pages A-24 through A-27. The order of the Wisconsin Supreme Court denying the supervisory writ is reprinted in the appendix, at pages A-28 through A-30.

JURISDICTION

This case involves review of a state court discovery order entered by the trial court on November 10, 1988 (App. A20-A23). Petitioner timely sought leave to appeal to the Wisconsin Court of Appeals. Leave was denied by an order dated and amended on December 14, 1988. (App. A24-A27.) A petition for supervisory writ was filed with the Wisconsin Supreme Court. This petition was denied on February 1, 1989 (App. A28-A30).

This Court has jurisdiction over all final judgments rendered by a state court, as provided in 28 U.S.C. §1257. Jurisdiction in this case, which involves review of a state court discovery order requiring production of certain documents, is found in this Court's holding in *Perlman v. U.S.*, 247 U.S. 7 (1918), and the collateral order doctrine. Petitioner also relies on 28 U.S.C. §1651 as an aid to this Court's jurisdiction.

The trial court was in possession of the documents at the time it ordered them produced.[1] Although discovery orders are generally reviewed on appeal from a contempt judgment resulting from a failure to comply with the discovery order (*Alexander v. United States*, 201 U.S. 117, 121-22 (1905)), an exception arises where, as here, the trial court has possession of the documents and the party is "powerless to avert the mischief of the order" (*Perlman v. United States*, 247 U.S. 7, 13, 38

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[1] The court had ordered, at the time the documents were given to it for *in camera* review, that any production would be by defendant at defense counsel's office. Therefore, the court led defendant to believe that the documents would be returned to defendant before any actual production. Unfortunately, the court, itself, later produced the documents to plaintiffs.

S.Ct. 417 (1918), cited with approval in *United States v. Ryan*, 402 U.S. 530, 532-33 (1971). The requirement that a party must be held in contempt before an order to produce is appealable is not absolute, as this Court recently recognized. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 52, n. 8 (1987).

This Court also has jurisdiction under the collateral order doctrine. This doctrine recognizes that the finality requirement has a practical, and not technical, construction. *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 478, n.7 (1975). The requirement of finality found in 28 U.S.C. § 1257 "should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 52 (1987). In this case, if this Court does not take jurisdiction and review the order to produce documents, then petitioner will be irreparably harmed, since the documents, to the extent disclosed, will have lost their confidential status. *Perlman v. United States*, 247 U.S. 7, 12-13, 38 S.Ct. 417 (1918); *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 51-52 (1987).

The policy considerations underlying the collateral order doctrine fit this case. Federal questions have been conclusively and erroneously decided by a state court. Those questions concern not only whether documents should have been produced to plaintiffs, but also whether those documents must now be excluded from use in further discovery and from use at trial. Furthermore, once plaintiff's counsel has viewed privileged documents, one "cannot unring the bell" by use of a later appeal.

Therefore, such production continues to affect all aspects of this case as it proceeds to judgment.

Finally, production of documents in this case does not moot the question, as it might in other ordinary cases. The case at bar is but one of a group of cases in various jurisdictions throughout the country dealing with same product, the same manufacturer, similar alleged injuries and "defects," and similar issues at law. Production of the same documents is sought in other cases with plaintiffs and defendants utilizing the same arguments set forth in this matter. (See also footnote 2, *infra*). Therefore, allowing discovery in this case could very well result in discovery in other cases to the continuing and future detriment of defendant.

This Court should formally recognize that the character of national litigation is such that, while consisting of different cases, those cases are not entirely independent in all ways. Events—including discovery—in one action necessarily and inevitably affect the others. Therefore, unlike standard individual cases, discovery in one suit does not moot the issue, since it continues to have repeated and widespread effect. This Court, therefore, should take a "pragmatic approach" to the finality requirement and accept review. 94 L.Ed 2d at 52-53, n. 8.

This Court should also take jurisdiction because petitioner's first amendment rights will be forever lost. Where a constitutional issue will not survive for this Court's review, there is jurisdiction over a collateral, non-final order. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 51 (1987), citing *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975).

Petitioner also relies on 28 U.S.C. §1651 as an aid to this Court's jurisdiction. Where the appeal may be mooted unless a stay is entered, an extraordinary writ may be issued "in aid of this Court's appellate jurisdiction." *Renaissance Arcade v. County of Cook*, 473 U.S. 1322, 1323 (1985). In this case, because petitioners are requesting a declaration that the documents are absolutely privileged and that no use or communication of them or their substance be allowed in this or any other case, an extraordinary writ lies. See *Kerr v. United States*, 426 U.S. 394, 404 (1976). This case presents exceptional circumstances. Adequate relief cannot be obtained from any other court. Sup. Ct. R. 26.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257. State courts' certiorari.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under

the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the Wisconsin Circuit Court, entered in the above-entitled proceeding on November 10, 1988, review of which was denied by the Wisconsin Supreme Court on February 1, 1989. In the alternative, petitioner prays that an extraordinary writ issue pursuant to 28 U.S.C. §1651.

STATEMENT OF THE CASE

Background and Procedural History of This Case.

In the November 7, 1980, issue of the Morbidity and Mortality Weekly Report ("MMWR"), the Centers for Disease Control ("CDC") reported that there were two state surveys showing an association between the ingestion of aspirin and Reye's syndrome.

This report and the studies were considered controversial by petitioner, the manufacturer of Bayer Aspirin. Petitioner knew it was "a near inevitability" that the Food and Drug Administration ("FDA"), after reviewing the report, would commence regulatory action. In addition, petitioner felt it faced immediate potential civil product liability actions (App. A67). At the direction of petitioner's attorney, an investigation and assessment of the studies was commenced (App. A67). Petitioner

also retained outside counsel, including the firm of Covington and Burling, to represent it on legal aspects of the claimed relation between Reye's Syndrome and aspirin (App. A67).

During the investigation and development of information in relation to Reye's syndrome, attorneys for petitioner communicated with corporate employees and with outside counsel. Outside consultants were retained and studies were undertaken at the direction of counsel. Meetings were held with corporate employees and attorneys to respond to anticipated or pending regulatory action and civil litigation (App. A68-A69).

As anticipated by petitioner, litigation did commence after publication of the MMWR. In early 1982, the FDA commenced a regulatory administrative proceeding to determine whether there should be labels on aspirin regarding Reye's Syndrome (App. A36). On May 17, 1982, civil suit was instituted by the Public Citizen Health Research Group ("HRG") to seek a court order finding that aspirin was misbranded and mandating that the FDA require labelling on aspirin (A36, A86-A87). The AFA intervened in this suit, *Public Citizen Health Research Group, et al. v. Hayes*, No. 82-1346 (D.C. Dist.), in March, 1983 (App. A87).

Suit Instituted by Respondent

On December 5, 1985, respondents sued petitioner for personal injuries on product liability theories, claiming that the minor contracted Reye's Syndrome as a result of taking Bayer Aspirin, petitioner's product. During litigation, respondents demanded production of documents in Sterling's possession relating to the

relationship between aspirin and Reye's Syndrome. The demand was virtually without limitation, including all documents or communications to the FDA (regard less of whether such communications related to regulatory action against Sterling), and all documents regarding meetings of Sterling employees and agents as to Reye's Syndrome (regard less of whether the meetings were with Sterling attorneys or in the course of a legal investigation). (App. A1-A7.)

Sterling produced seven boxes containing thousands of documents in response to plaintiffs' request (Plaintiffs' Brief in Support of Motion for Contempt Order and Motion to Compel Discovery, dated 6/9/88, at p. 3). However, Sterling asserted that 1,026 documents, all of which postdated publication of the November 7, 1980, issue of the MMWR (App. A33) were subject to (1) attorney-client privilege, (2) attorney work product privilege and/or, (3) first amendment privileges, including the right to associate and to petition the government (Defendant's Brief in Support of Privileged Documents, App. A98-A119). Sterling also claimed attorney-client and work product privilege in communications with the AFA, a trade association of aspirin manufacturers of which Sterling is a member (*Id*). On May 8, 1987, the parties entered into a Stipulation and Order which was later entered as an order by the trial court. It generally provided that discovery materials could be designated by any party as confidential and were protected against disclosure (App. A8-A11). However, the agreement and order was "without prejudice to the right of any party to bring before the Court at any time the question of whether any particular

information is confidential and/or proprietary" (App. A10).[2]

Trial Court Orders

On January 4, 1988, the trial judge ordered Sterling to describe the categories of documents claimed to be privileged (App. A18-A19). Respondents, if they did not agree that those categories of documents were privileged, were to demand the documents be submitted to the court for *in camera* inspection (App. A18). Sterling complied with the court's order and filed a list of categories of documents claimed to be privileged (App. A55-A56). An *in camera* inspection was scheduled for June 17, 1988. Before the inspection was conducted, the judge recused himself at plaintiffs' request, and the *in camera* inspection was rescheduled for July 20, 1988.

On July 20, 1988, the new judge, without inspecting the documents, ordered petitioner to turn them over to respondents' counsel for review. (App. A22-A23). After review, respondents' counsel was to inform the court which documents were concededly privileged and which documents were in dispute (App. A22-A23). Petitioner filed a motion for reconsideration on the grounds, *inter alia*, that a judicial determination of privilege should be made *before* any documents could be viewed by respondents' counsel.

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[2] It must be noted that plaintiffs have since moved to vacate that protective order. Although the court below has not yet done so, its willingness to lift the protective order in the future was presaged by its now-rescinded order of July 20, 1988, directing, at plaintiffs' request, defendant to seek the lifting in other cases of similar protective orders which defendant had originally sought.

The trial court granted petitioner's motion for reconsideration and vacated its prior order. Still in possession of the documents, the court reviewed them and, on November 10, 1988, issued a written decision denying the majority of Sterling's claims of privilege, and ruled that certain specified documents be turned over directly to plaintiffs' counsel by the court on November 28, 1988 (App. A54).

Appeals in the Wisconsin Courts

Sterling petitioned the Wisconsin Court of Appeals for leave to appeal the court's order of November 10, 1988. The AFA requested permission to intervene in the petition for leave to appeal. On December 14, 1988, AFA's petition to intervene was granted; however, both Sterling's petition for leave to appeal and AFA's petition for a supervisory writ were denied. (App. A24-A27.) A petition for a supervisory writ was filed with the Wisconsin Supreme Court by petitioner. The AFA filed a petition for review. The Wisconsin Supreme Court denied the petitions on February 1, 1989 (App. A28-A31).

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION.

When the CDC suggested that aspirin, probably the most commonly ingested pharmaceutical product in United States history, might be associated with a rare, but serious set of symptoms known as Reye's Syndrome, petitioner and other manufacturers of aspirin confronted the inevitable: years of regulatory and product liability litigation.

The manufacturers' freedom to associate with one another for the common defense of their product and petitioner's right to communicate internally for the purpose of petitioning the government are protected by the first amendment to the United States Constitution. The trial court, however, denied that the first amendment protected petitioner from disclosing documents to respondents. As a result, respondents in this case and elsewhere will have wholesale access to all communications between manufacturers and all documents used as part of petitioner's efforts to petition the government for a redress of grievances and defend itself in court.

II.

SUPREME COURT REVIEW WILL DEFINE THE ASSOCIATIONAL RIGHTS OF CORPORATIONS AND REQUIRE A BALANCING OF THOSE RIGHTS WITH APPROPRIATE GOVERNMENTAL INTERESTS.

> "[I]n no country in the world has the principle of association been more successfully used, or applied to a greater multitude of objects than in America. Besides the permanent associations, which are established by law, under the names of townships, cities and counties, a vast number of others are formed and maintained by the agency of private individuals. . .
>
> "[I]n the United States, associations are established for the public safety, commerce, industry, morality and religion. There is no end which the human will despairs of attaining through the combined powers of individuals united into a society." A. deTocqueville, *Democracy in America* (Heffner, Ed., Signet, 1956).

There is a dearth of case law on the first amendment rights of corporations to associate with one another. However, this Court has extended first amendment protection to corporations generally. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1970). Also, this Court has recognized that the first amendment protects commercial and professional associations. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

The level of first amendment protection afforded to corporate association raises issues of national import. In our complex commercial and legal culture, a challenge to the safety, effectiveness, or inherent value of a nationally-distributed product raises issues of common concern to its manufacturers. When these manufacturers form associations to promote and defend their mutual interests, internal affairs of the associations become affected with first amendment interests. The extent to which association members are entitled to maintain confidentiality in their communications depends entirely on where the line is drawn between their associational rights and compelling governmental interest in frank and open communication between industry and regulatory agencies, on the one hand, and governmental interests in open discovery in civil litigation, on the other hand.

A decision from this Court would provide guidance to lower courts, as did *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). One reason that case arose is the *Federal Rules of Civil Procedure*'s failure to draw a line between a litigant's constitutional right to disseminate information and governmental interests reflected in Rule 26(c), which allows trial courts to enter protective orders limiting dissemination of information produced in civil discovery. Similarly, federal rules are

necessarily imprecise with respect to balancing of interests between the rights of litigants opposing discovery on constitutional grounds and governmental interests, countervailing or otherwise.

The affidavit of Bruce Dickson, general counsel for the AFA, demonstrates that one of the purposes of the Foundation was for manufacturers of aspirin, such as petitioner, to associate for the common purpose of promoting the aspirin industry (App. A83-A96). The common interests of Foundation members crystallized following the suggestion that aspirin, when taken to relieve common symptoms such as pain and fever, might be associated with Reye's Syndrome.

The Foundation was actively involved in preparation for the common defense of its members in regulatory and product liability actions. Many confidential communications between its officers and directors, Dickson, and officers and employees of individual members took place subsequent to CDC's suggestion of a relation between aspirin and Reye's Syndrome (App. A85-A96). These conversations were often memorialized in minutes, memoranda, and other documents. No persons outside the AFA were involved in the conversations, except consultants specifically hired by the AFA to assess relevant information (App. A91-A92).[3] The trial court failed to recognize the most basic

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[3] Many documents of which discovery was sought embodied confidential communications between defendant and academicians; e.g., regarding theretofore unpublished or unfinished work. Plaintiffs never denied the undisputed fact that they had full access to the actual data and information relating to those studies and eventual publications. In effect, plaintiffs wanted more than data, they wanted to know what defendants thought of the data. Allowing

associational freedom in these confidential communications.

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such discovery would create hardships on industry, the scientific and academic community, and, indeed, the government and public at large.

The free flow of ideas within the academic community would be killed. Academic freedom has long been viewed as a special concern of the first amendment. It is at the heart of higher education and comes within the first amendment's protections. Therefore, judicially authorized intrusions must be limited for compelling reasons. *Dow Chemical Co. v. Allin*, 667 F.2d 1262, 1274 (7th Cir. 1982). Researchers must be able to conduct their activities without fear that fruits of their labors may be appropriated or scrutinized by biased third parties, whose interests are antithetical to the researchers'. Otherwise, the contrary realization might well be both unnerving and discouraging, jeopardizing both the studies and careers of academicians. See *Dietchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561, 562 (7th Cir. 1984).

In a very real sense, communication with academicians is very similar to the interest protected by the attorney work product privilege. It is in the best interest of the government and public at large to enable industry to have free and unfettered discussions with the academic community, exchange ideas, and generally further scientific knowledge. In so doing, not only would the state of the art be advanced, but so would the safety and well being of the community. As with an attorney who fears his work product might be later discovered by his opponent, industry would be loathe to openly communicate with academicians, if it were known that their words could be twisted and their embryonic ideas early in research used against them.

The need for protection of these documents from disclosure is underscored by the fact that the trial court, itself, recognized that absolutely no need had been shown for these or any other documents sought by plaintiffs. As the court stated, "plaintiffs have not shown anything other than a generalized need for the documents. No showing or substantial need or undue hardship has been made." (App. A37.)

This Court must balance the infringement upon the freedom of association against countervailing governmental interest. *Shelton v. Tucker*, 364 U.S. 479 (1960). In the instant case, the balancing of interests favors first amendment protection against disclosure. As the trial court correctly held, there is no compelling need for disclosure (App. A37). The most basic analysis of the facts supports this conclusion.

The parties in this case have one central objective: to prove or disprove the existence and nature of a relationship between aspirin and Reye's Syndrome. The parties have equal access to the basic data from which the CDC and governmental agencies originally suggested that there was a relationship. Both parties are privy to conclusions of those who assessed the data. What respondents want from petitioner are the conclusions, thought processes, and strategies of the Foundation, petitioner, and other manufacturers regarding the meaning and sufficiency of data supporting the initial suggestion of a relationship between aspirin and Reye's Syndrome. In short, respondents want to know what the other side *thinks* of the evidence.

Respondents' need for this information has nothing to do with obtaining evidence to establish a connection between aspirin and Reye's Syndrome. They do not want data or other information to support their claim. They only want to know what has been *said* by petitioner and AFA *about* the information and how this can be used to damage any position taken by Sterling at trial. Presumably, the case will rise or fall on the evidence, not what petitioner or AFA thinks about the evidence.

The burden on associational freedom from this intrusion is obvious. The spectre of disclosure limits the right of association members to do just that—associate. They cannot speak freely for fear that every word can be used against them at some later date, irrespective of respondents' lack of need for the information.

Moreover, there is damage to associational freedom by intervention alone. It does not matter that intrusion into a trade association might be less offensive to the first amendment than an intrusion upon political or social organizations. It is still an intrusion and, as the trial court found, there is no need for it in this case. At the very least, the first amendment protects associations against disclosure simply for disclosure's sake.

III.

PETITIONER'S PREPARATION FOR REGULATORY LITIGATION IS PROTECTED BY THE FIRST AMENDMENT.

A. THE INSTANT CASE WILL DEFINE THE PARAMETERS OF THE *"NOERR-PENNINGTON"* PRIVILEGE FOR LOWER COURTS THROUGHOUT THE COUNTRY.

Regulatory litigation before governmental agencies is one form of petitioning the government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971). Allowing respondents access to petitioner's files relating to litigation before

the Food and Drug Administration suffocates petitioner's right to petition the government freely and forcefully.

The right to petition the government, like other first amendment rights, requires a certain amount of "breathing space." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). A party petitioning the government cannot operate effectively in the arena of regulatory litigation, unless it is free to speculate, hypothesize, critique, and generally engage in exhaustive introspection (including engaging in such activities with other manufacturers, experts, and academicians), so its petitioning activity reflects its true position. The right to petition will be seriously hampered if first amendment protection of petitioning activity does not extend to the open interchange necessary to the internal, preparatory process.

The trial court's error in this case is manifest. Rather than examining the consequences to petitioner's first amendment rights from allowing discovery of petitioning documents, the court summarily wrote the argument off as "not recognized in Wisconsin" and "not an attempt to impose liability on [petitioner] for its lobbying and petitioning activities" (App. A53). The court ignored Wisconsin law, which expressly recognizes privileges based upon federal constitutional rights. Wis. Stat. §905.01. Moreover, there is no doubt that respondents will try to use the information sought in their attempt to impose liability upon petitioner. Whether that liability is technically based upon petitioning activity, itself, is the paradigm of a distinction without a difference. The chilling effect of the discovery is the same either way.

The insensitivity of the trial court to federal constitutional issues arising out of petitioner's claim of

first amendment privilege is reason enough to accept this case for certiorari. Courts across the country supervise discovery in cases of this complexity and magnitude every day. Each jurisdiction's courts operate under a different set of procedural rules; consequently, different levels of governmental interest in the discovery process are manifested. A decision which clearly spells out applicability of the first amendment to discovery procedures and balances these protections and governmental interests against any countervailing governmental interests in open discovery will greatly benefit all trial courts, both state and federal.

B. *NOERR-PENNINGTON* PROTECTION FOR PETITIONING ACTIVITY MUST EXTEND TO COMMUNICATIONS PREPARATORY TO THE ACTUAL PETITION.

The *Noerr-Pennington* doctrine, in its ordinary context, protects businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts. *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. den.* 467 U.S. 1210 (1984). The policy underlying the *Noerr-Pennington* doctrine is to preserve the first amendment right to petition government officers and encourage a free flow of ideas to political bodies to ensure intelligent decision-making. *Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md.*, 756 F.2d 1986 (4th Cir. 1985).

Confidentiality of documents prepared by petitioner as part of its case before the FDA is a logical extension of principles and policies underlying first amendment protection of petitioning activity. The expectation of confidentiality in intracorporate communications is

essential to generating a free flow of ideas to the government. Without assurance that petitioner's theories, proposals, and hypotheses will not find their way to an adverse litigant, petitioner's employees and consultants cannot effectively present ideas to each other and, consequently, to the government. Without confidentiality, intracorporate speech will be reduced to bland disclaimers or pure sloganeering. Otherwise, petitioner could not avoid making statements which could be used against it in subsequent litigation. For example, no manufacturer would dare oppose any proposed regulation or deny any defect its product was alleged to have, for fear of being later accused of fraudulent concealment. On the other hand, if a defect was admitted, the eventual use of the admission is obvious. No manufacturer, therefore, could afford to ever take, advocate, or petition in support of any substantive position at all.

The right to petition the government for redress of grievances, established before the Industrial Revolution and dawn of the modern manufacturing corporation, must be flexible enough to allow for changing social and economic structures. The corporate citizen does not petition the government in the same fashion as a disgruntled individual or private political group. The final petition submitted to the government is often the result of a Byzantine decision-making process. This process involves numerous sources of input, each contributing in its own way to the final product.

The corporate petitioner should not, however, be deprived of the same right to free and open exchange of ideas with its government, merely because its process for arriving at its collective "idea" involves multiple formative stages. It is the hallmark of the Bill of Rights

that broad and general concepts enunciated therein can be translated to modern institutions. Moreover, governmental regulatory agencies have a compelling interest in continuing the free flow of frank communication with the entities regulated. If that communication is chilled, efficient functioning of regulatory agencies will be impaired, and interests of the public at large will be jeopardized. Therefore, this case also presents the issue of the balance of the government's need to know versus the individual plaintiff's desire to know.

C. THE LOWER COURTS HAVE HELD THE *NOERR-PENNINGTON* DOCTRINE APPLICABLE TO CIVIL DISCOVERY DISPUTES.

Several lower courts have held that there can be no discovery of documents relating to a party's petitioning activities with the government. *In Re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987); *Australia/ Eastern/ USA v. United States*, 537 F.Supp. 807 (D.D.C. 1982); *Britt v. Superior Court*, 20 Cal.2d 844, 574 P.2d 766, 143 Cal.Rptr 695 (1978).

The question of balancing first amendment rights to petition with perceived needs of civil discovery was addressed squarely in *Burlington*. There, a pipeline company brought an anti-trust action against various railroad companies, contending that the railroads conspired to prevent construction of a national coal pipeline by filing and defending easement litigation. The district court held that the pipeline company could discover documents related to these lawsuits. The fifth circuit reversed, holding that documents prepared by the railroads in connection with lawsuits against the pipeline company were protected from discovery,

because they constituted a legitimate, good faith effort to petition the government. In so holding, the Court of Appeals stated "[T]he district court erred in ordering discovery without considering whether the specific litigation activities were illegitimate" in the sense that such activities were in and of themselves anti-competitive activity. 822 F.2d at 525. The court added that "[T]o permit discovery of the documents withheld in this case as the basis of a larger conspiracy by the railroads would undermine the effectiveness of the very type of petitioning the Supreme Court's decisions had protected." 822 F.2d at 525.

In *Australia/Eastern/USA*, the district court concluded that, in instances of government petitioning, "the first amendment should be balanced against the need for disclosure." 537 F.Supp. at 811. This Court ultimately decided discovery was permissible, but only because the petitioning activities involved foreign governments (*Noerr-Pennington* applies only to petitioning activities made to U.S. government officials).[4] The case thus stands for the proposition that any need for discovery of petitioning activity must be carefully balanced against the possibility that discovery would chill a party's first amendment right to petition the government. As such, *Australia/Eastern/USA* is consistent with the fifth circuit's opinion in *Burlington*.

---

[4] Implicit in this holding is that more is at stake than first amendment rights of a party. If only first amendment rights were at stake, then it would not matter whether the communication had been with the United States government or any other nation's government. Therefore, this holding stands for the proposition that, in addition to the party's first amendment rights, the federal government has a compelling interest in insuring that full and frank discussions take place between regulatory agencies and the entities which they regulate.

The Supreme Court of California also has barred discovery of petitioning activity. In *Britt v. Superior Court*, 20 Cal.3d 844, 574 P.2d 766, 143 Cal.Rptr. 695 (1978), a personal injury case arising out of the proximity of a public airport, the court reversed a discovery order which required plaintiff to answer certain deposition questions concerning his participation in organizations which had petitioned the government regarding the airport's operations. The court held that the chilling effect such discovery would have on first amendment petitioning activities outweighed the truth-finding policy underlying discovery. The California Supreme Court further stated:

> "Indeed, in some respects, the threat to first amendment rights may be more severe in a discovery contest, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." 20 Cal.3d at 857, 574 P.2d at 774, 143 Cal.Rptr at 703.

Research has revealed no reported case which has dealt squarely with the issues raised by this petition. Nevertheless, it is apparent from the foregoing cases that first amendment concerns have been and will continue to be addressed in this context. A decision by this Court will aid greatly in resolving future controversies.

IV.

THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH CONSTITUTIONAL BOUNDARIES FOR THOUSANDS OF MULTIPARTY PRODUCT LIABILITY SUITS CURRENTLY PENDING.

Although this Court has expounded upon first amendment privileges against civil discovery in other contexts (*e.g., Herbert v. Lando*, 441 U.S. 155 (1979)), it has never discussed the balance between the governmental interest in open discovery and corporate freedom to associate and petition the government. Recent trends suggest that this issue is certain to recur.

Courts are inundated with so-called mass product liability cases. This phrase describes multiple lawsuits arising out of mass distribution of a single product which allegedly causes injury or illness in a fairly uniform manner. Among better-known examples of such products are asbestos, "Agent Orange," DES, and Bendectin.

The pharmaceutical industry is particularly susceptible to such litigation. Its products are designed to alter body chemistry in a more or less uniform manner to achieve a particular result. By their nature, all such medications have side effects; nonexistent or idiosyncratic side effects are easy to allege and difficult to disprove. Thus, if a widely-distributed pharmaceutical product is alleged to affect users in an unanticipated manner, many lawsuits will inevitably follow.

Vulnerability of the pharmaceutical industry to allegations of harmful side effects has been demonstrated in recent cases involving Bendectin, a drug prescribed from 1957-1983 for pregnant women experiencing

morning sickness. *Richardson v. Richardson Merrell, Inc.*, 857 F.2d 823, 824 (D. C. Cir. 1988). Following allegations that Bendectin caused children to be born with various birth defects, over 1,500 lawsuits were filed against various related corporate entities. 857 F.2d at 824. Consequently, Bendectin was taken off the market in 1983. *Lynch v. Merrell National Lab., Inc.*, 830 F.2d 1190, 1191 (1st Cir. 1988). Ironically, several U. S. Courts of Appeals have recently affirmed jury verdicts and judgments notwithstanding the verdict in which it was found that Bendectin *does not* cause birth defects. *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988); *Lynch*, 830 F.2d at 1191; *Richardson*, 857 F.2d at 824. Nevertheless, incredible costs of national litigation and insurance forced Bendectin from the market. *Brown v. Superior Court*, 44 Cal.3d 1049, 1064 (1988).

When the manufacturer of a pharmaceutical product receives information and studies suggesting an association between its product and a rare onset of symptoms, two events become inevitable. First, there will be regulatory litigation before the FDA. Second, someone who has contracted symptoms described in the studies will sue one, some, or all product manufacturers.

An equally inevitable incident of mass litigation is that plaintiffs' counsel will request production of as many internal documents relating to the allegedly dangerous product as courts will allow. They will argue that the documents could possibly lead to admissible evidence on issues such as knowledge of danger, foreseeability of risk, and alternative composition.

Conflict between the government's and manufacturers' interests in free and open manufacturer-government

communication to facilitate proper regulation, and open intermanufacturer and intracorporate communication to facilitate common defense of their product, on the one hand, and the governmental interest in open discovery on the other hand, raises two issues, resolution of which will provide guidance to all lower courts:

> 1. Does a corporation, through its employees and agents, have a right to associate and speak freely with other corporations and its own employees and agents without fear these communications will be turned over to its legal adversary?
>
> 2. How should courts balance conflicting values underlying these first amendment interests, governmental interest in open communication with regulated entities, and the interest in open discovery?

Lower courts will benefit greatly from an opinion defining the level of confidentiality afforded by the first amendment in this context. First amendment protection varies with the identity of the party claiming the protection (*Minneapolis Star v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (taxes on print and ink used by newspaper publishers are unconstitutional)), the nature of the speech (*Central Hudson Gas and El. Corp. v. Public Service Comm.*, 447 U.S. 557 (1986) (distinguishing levels of protection between commercial and political speech)), and the nature of the restraint or disclosure sought (*Near v. Minn.*, 283 U.S. 697 (1931) (distinguishing prior restraint and subsequent regulation)). Consequently, an opinion from this Court regarding the level of confidentiality afforded these communications will provide invaluable assistance to

lower courts in balancing manufacturers' first amendment rights and governmental interests.

There will always be *some* degree of governmental interest in open discovery of a manufacturer's internal documents. What is not certain, however, is how this interest compares to the manufacturer's first amendment interests and other governmental needs. Resolution of this issue will guide lower courts in determining what kind of showing of particularized need will be necessary to overcome these first amendment interests.[5]

V.

CONCLUSION.

For these various reasons, this petition for a writ of certiorari should be granted. Petitioner reiterates that, if this Court does not accept this matter for review, then important federal questions, as well as public

---

[5] Of course, as previously established, *no* showing of *any* need at all was made here.

interest in maintaining confidentiality of communications between the attorney/client, as well as an attorney's work product, will be harmed.[6]

Respectfully submitted,

Michael J. Bonesteel
Robert L. Kaufman
HAIGHT, BROWN & BONESTEEL
201 Santa Monica Boulevard
Post Office Box 680
Santa Monica, California 90406

---

[6] Moreover, the trial court's holding that work product privileges attach only to materials in currently ongoing cases, removing such protections once a case is resolved, does impermissible mischief to first amendment and attorney work product privilege guarantees. Surely, the premise, justification, and need for work product protection does not disappear when a case is resolved, especially in the mass litigation context. Furthermore, although on its face the sixth amendment applies only in criminal proceedings, its spirit and guarantees should be applied in civil litigation where, as here, one is threatened with denial of privileges essential to continued effective representation of counsel. Otherwise, counsel's industry and effectiveness will be chilled, realities of continued mass litigation will be ignored, and quasi-criminal penalties (such as punitive damages, here) can be imposed upon a one who is denied effective counsel.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 17, 1989, I served the within *Petition for a Writ of Certiorari to the Supreme Court of Wisconsin or, Alternatively, for Writ of Mandamus* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Judge Gary A. Gerlach
Circuit Court for Milwaukee
901 North 9th Street
Milwaukee, Wisconsin 53233

Richard C. Ninneman
Hollis E. Wright
Whyte & Hirschbrock
111 East Wisconsin Avenue
Suite 2100
Milwaukee, Wisconsin 53202

Mr. Robert L. Habush
Habush, Habush & Davis
777 East Wisconsin Avenue
Suite 2200
Milwaukee, Wisconsin 53202

Mr. Randal N. Arnold
Kluwin, Dunphy, Hinshaw
& Culbertson
788 North Jefferson Street
Suite 500
Milwaukee, Wisconsin 53202

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 17, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)

88-1691

No.

Supreme Court, U.S.
FILED
APR 18 1989
JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

October Term, 1988

STERLING DRUG INC.,

Petitioner,

v.

CIRCUIT COURT FOR MILWAUKEE, THE HONORABLE GARY A. GERLACH, JUDGE PRESIDING, AND JACQUELINE FOX, A MINOR, BY HER GUARDIAN AD LITEM, ROBERT L. HABUSH, GARY FOX AND JUDITH FOX,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN OR ALTERNATIVELY FOR WRIT OF MANDAMUS

MICHAEL J. BONESTEEL
ROBERT L. KAUFMAN
HAIGHT, BROWN & BONESTEEL
201 Santa Monica Blvd.
P.O. Box 680
Santa Monica, CA 90406
(213) 458-1000

Counsel of Record in Pro Hac Vice

Pandick Technologies, Inc., Chicago • (312) 236-0200

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STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

JACQUELINE FOX, a minor by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,

Plaintiffs,

vs.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,

Defendants.

Case No. 687-394

PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS PURSUANT TO SECTION 804.09, WISCONSIN STATUTES

TO: STERLING DRUG COMPANY, INC.
c/o Mr. Frank W. Doster
Fiorenza & Hodan, S.C.
5980 West Brown Deer Road
Milwaukee, WI 53223-2382

PLEASE TAKE NOTICE that the plaintiffs require defendant Sterling Drug, Inc. to produce within thirty

(30) days hereof at the offices of their attorneys, Habush, Habush & Davis, S.C., 777 East Wisconsin Avenue, Suite 2200, Milwaukee, Wisconsin, a copy of each of the following described documents:

DEFINITIONS AND INSTRUCTIONS

1. As used herein, the terms "you," "your," or "Sterling" refers to Sterling Drug Company, Inc. and each of its parents, predecessors, subsidiaries, divisions, and affiliates, each of its present and former officers, employees, agents, representatives, attorneys and each person acting or purporting to act on its behalf. Please state the specific entity involved in a particular answer.

2. As used herein, the term "representative" means any and all agents, employees, servants, officers, directors, attorneys or other persons acting or purporting to act on behalf of the person in question.

3. As used herein, the term "person" means any natural individual in any capacity whatsoever or any entity or organization, including divisions, departments, and other units therein, and shall include, but not be limited to, a public or private corporation, partnership, joint venture, voluntary or unincorporated association, organization, proprietorship, trust, estate, governmental agency, commission, bureau or department.

4. As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the original and each copy, regardless of origin or location, of any book, pamphlet, periodical, letter, memorandum (including any memorandum or report of a meeting or conversation), invoice, bill, order form, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, cable, report, contract, agreement, study, handwritten note, draft, working paper, chart, paper, print, laboratory record, drawing, sketch, graph, index, list, tape, photograph, microfilm, data sheet, or data processing card, or

any other written recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, which is in your possession, custody, or control or which was, but is no longer, in your possession, custody or control.

5. As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understanding between or among two or more persons.

6. As used herein, the terms "identification," "identify," or "identity," when used in reference to (a) a natural individual, require you to state his or her full name and residential and business addresses; (b) a corporation, require you to state its full corporate name and any names under which it does business, its state of incorporation, and the address of its principal place of business; (c) a business, require you to state the full name or style under which the business is conducted, its business address or addresses, the types of businesses in which it is engaged, the geographic areas in which it conducts those businesses, and the identity of the person or persons who own, operate and control the business; (d) a document, require you to state the number of pages and the nature of the document (i.e., letter or memorandum), its title, its date, the names and names of its authors or recipients, and its present location and custodian; (e) a communication, require you, if any part of the communication was written, to identify the document or documents which refer to or evidence the communication, and, to the extent that the communication was nonwritten, to identify the persons participating in the communication and to state the date, manner, place and substance of the communication.

REQUEST No. 1: All documents or communications in your possession or control which contain information relevant to the subject matter of Interrogatory No. 1 of Plaintiffs' Second Set of Written Interrogatories to Sterling Drug, Inc.

REQUEST No. 2: All documents or communications in your possession or control which contain information relevant to Interrogatory No. 3 of Plaintiffs' Second Set of Written Interrogatories to Sterling Drug.

REQUEST No. 3: All documents or communications in your possession or control which contain information relevant to the subject matter of Interrogatory No. 5 of Plaintiffs' Second Set of Written Interrogatories to Sterling Drug.

REQUEST No. 4: All documents or communications in your possession or control which contain information relevant to the subject matter of Interrogatory No. 7 of Plaintiffs' Second Set of Written Interrogatories to Sterling Drug.

REQUEST No. 5: All documents or communications in your possession or control with respect to information you have provided to the Food and Drug Administration with respect to Reye's Syndrome.

REQUEST No. 6: All documents or communications in your possession or control with respect to any written documents or materials which have been provided to you by the Food and Drug Administration with respect to Reye's Syndrome.

REQUEST No. 7: All written documents or materials which you have provided to the Center for Disease Control with respect to Reye's Syndrome.

REQUEST No. 8: All written documents or materials which have been provided to you by the Center for Disease Control with respect to Reye's Syndrome.

REQUEST No. 9: All written documents or materials you have provided to the Ohio, Michigan and Arizona state health departments with respect to Reye's Syndrome.

REQUEST No. 10: All written documents or materials which have been provided to you by the Arizona, Ohio or Michigan state health departments with respect to Reye's Syndrome.

REQUEST No. 11: All documents or other written materials in your possession or control with respect to the subject matter covered by Interrogatory nos. 17 and 18 of the Plaintiffs' Second Set of Written Interrogatories to Sterling Drug.

REQUEST No. 12: All documents or other written materials which contain information relevant to the subject matter of Interrogatory No. 24 of Plaintiffs' Second Set of Written Interrogatories to Sterling Drug.

REQUEST No. 13: All documents or other written materials which contain information relevant to the subject matter of Interrogatory No. 26 of Plaintiffs' Second Set of Written Interrogatories to Sterling Drug.

REQUEST No. 14: All documents or other written materials which contain information relevant to the subject matter of Interrogatory No. 28 of Plaintiffs' Second Set of Written Interrogatories to Sterling Drug.

REQUEST No. 15: All documents or other written materials in your possession or control which contain information relevant to meetings between Sterling Drug Company representatives and personnel of the Food and Drug Administration or the Center for Disease Control or the National Institutes of Health regarding Reye's Syndrome.

REQUEST No. 16: To the extent not previously answered, please provide all documents and other written materials in your possession or control with respect to all meetings of Sterling Drug employees and agents regarding the relationship between Reye's Syndrome and aspirin.

REQUEST No. 17: All documents or other written materials in your possession or control concerning any study performed in Halifax, Nova Scotia for the purpose of determining whether there is an association between aspirin use and Reye's Syndrome.

REQUEST No. 18: All documents or other written materials in your possession or control concerning any research or study performed by John Crocker, M.D., for the purpose of determining whether there is an association between aspirin use and Reye's Syndrome.

REQUEST No. 19: All documents or other written materials in your possession or control concerning any research or study performed by G. Dennis Pollack, Ph.D. of Ohio State University for the purpose of determining whether there is an association between aspirin use and Reye's Syndrome.

REQUEST No. 20: All written materials pertaining to and documenting a market survey study conducted by representatives of Sterling Drug in 1979 and 1980 inquiring into the patterns of usage of aspirin and acetaminophen by a sample of mothers.

REQUEST No. 21: All documents or communications in your possession or control with respect to information you have provided to the National Institutes of Health with respect to Reye's Syndrome.

REQUEST No. 22: All written documents or communications with respect to information which has been provided to you by the National Institutes of Health with respect to Reye's Syndrome.

Dated at Milwaukee, Wisconsin this 22nd day of May, 1987.

HABUSH, HABUSH & DAVIS, S.C.
Attorneys for Plaintiffs

By: /s/ VIRGINIA M. ANTOINE
Virginia M. Antoine

P.O. ADDRESS:
777 East Wisconsin Avenue
Suite 2200
Milwaukee, WI 53202-5381
[414] 271-0900

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

JACQUELINE FOX, a minor, by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,

Plaintiffs,

v.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,

Defendants.

STIPULATION AND ORDER

Case No. 687 394

FILED
28 May 19 1987 28
GARY J. BARCZAK
CLERK OF COURTS

IT IS HEREBY STIPULATED by and between the parties, through their respective attorneys, that a protective order be entered pursuant to Section 804.01(3), Wis. Stats., including the following provisions:

1. Transcripts of depositions, exhibits, answers to interrogatories and other documents and materials filed with the Court pursuant to the pre-trial discovery of any party to this action, which are designated by any party as containing confidential and proprietary information, shall be placed in a sealed envelope or other container identifying this case including the words "CONFIDENTIAL: FOR USE IN *FOX* LITIGATION ONLY", and a statement substantially in the following form on the face of the envelope: "This envelope containing documents which are filed in this case by (name of party) is not to be opened nor the

contents thereof to be displayed or revealed except by Order of Court".

2. All transcripts of depositions, copies of exhibits, answers to interrogatories and all documents produced for inspection or which are received by counsel for any party pursuant to pre-trial discovery in this action which have been designated by an opposing party as containing or comprising confidential or proprietary information shall be retained by counsel and shall not be disclosed by counsel to any other person, except that, and solely for the purposes of this action, any such transcript, exhibit, answer and other document may be disclosed by counsel to the principals of the parties and by counsel to his associates and attorneys employed by him in preparation for, and trial of this action and to such other persons as may be requested by counsel to furnish technical or expert services, or to give testimony, with respect to the subject matter thereof, at the trial of this action; provided that each such other person to whom disclosure is so made has been previously identified to counsel for the party designating the information as confidential and proprietary and provided that each such other person, in a written instrument delivered to such counsel, acknowledges he is fully familiar with the terms of this Order and agrees to comply with and be bound by this Order, except as modified by further Order of Court.

3. No person shall make public disclosure of any information obtained pursuant to pre-trial discovery in this action, which information shall have been designated as confidential and proprietary by any party to this action, without further Order of Court.

4. No person shall make use of any information obtained pursuant to pre-trial discovery in this action, which information shall have been designated as confidential and proprietary by any party to this action, other than for purposes of this action, without further Order of Court.

5. The restrictions set forth in paragraphs 3 and 4 above shall not apply to information which, prior to disclosure, either is in the possession or knowledge of the party to whom such disclosure is made, or is public knowledge, and the restrictions of paragraphs 3 and 4 above shall not apply to information which, after disclosure, becomes public knowledge other than by act or omission of the party to whom such disclosure is made, or which is independently developed, or acquired from an independent source.

6. This Order shall be without prejudice to the right of any party to bring before the Court at any time the question of whether any particular information is confidential and/or proprietary, at which time the person asserting confidentiality shall have the burden of establishing the same.

Dated this 8th day of May, 1986.

FIORENZA & HODAN, S.C.
Attorneys of record for
defendant, STERLING DRUG, INC.

By: /s/ FRANK W. DOSTER
Frank W. Doster

HABUSH, HABUSH & DAVIS, S.C.
Attorneys for Plaintiffs
By: /s/ HOWARD DAVIS
Howard Davis

ORDER

IT IS HEREBY ORDERED THAT:

The terms and provisions set forth in the above and foregoing Stipulation be, and hereby are made the Order of this Court.

Dated: May 19/87

BY THE COURT:
/s/ ROBERT J. MIECH
Hon. Robert J. Miech

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

JACQUELINE FOX, a minor, by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,
Plaintiffs,

vs.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,
Defendants.

Case No. 687-394

FILED
31 JAN 4 1988 31
GARY J. BARCZAK
CLERK OF COURTS

ORDER

The above-entitled matter having come on for hearing on November 24 and 25, 1987 before the above named court upon the motion of plaintiffs to compel compliance with requested discovery by defendant, Sterling Drug, Inc., and plaintiffs having appeared by their attorneys, Habush, Habush & Davis, S.C. by Howard A. Davis, Esq., Marcia L. Grinder, Esq. and Virginia M. Antoine, Esq., and defendant having appeared by its attorneys, Fiorenza & Hodan, S.C. by Frank W. Doster, Esq. and also by Haight, Dickson, Brown & Bonesteel by Jeffrey B. Margulies, Esq., and the court having heard the arguments of counsel and having considered the papers previously filed by the respective

parties to this action, and being further well-advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiffs are entitled to discover from defendant all non-privileged information known by or received by defendant from 1963 through 1981 relating to the alleged cause and effect relationship, if any, between aspirin and Reyes Syndrome.

IT IS FURTHER ORDERED that plaintiffs are entitled to discover from defendant all non-privileged information known by or received by defendant from 1981 until the present time relating to the alleged cause and effect relationship, if any, beween aspirin and Reyes Syndrome, excluding information acquired by defendant through matters published in medical journals or drug companies' promotional materials, or similar materials published by persons or entities other than defendant.

IT IS FURTHER ORDERED that the foregoing time periods for relevant discovery shall apply generally to the more specific orders set forth hereinafter.

IT IS FURTHER ORDERED that defendant shall supplement their responses to plaintiffs' second set of written interrogatories as follows:

1. Sub-sections a, b and c of interrogatory no. 1 shall be answered with respect to any such warning issued from 1963 until the present time. With respect to subsection d, identify the person, if any, who made the ultimate decision as to any warning issued. If any such decision was made by committee, identify those persons participating in the committee decision.

2. Interrogatory no. 2 shall be answered by identifying any documents used by the person or persons identified in interrogatory no. 1 in arriving at any decision to issue any warning identified in response to interrogatory no. 1.

3. Interrogatory nos. 5 and 6 shall be supplemented by identifying any documentation resulting from any investigation by Sterling as to an alleged cause and effect relationship between aspirin and Reyes Syndrome prior to October, 1981, if any such documents exist.

4. Interrogatory nos. 7 and 8 shall be supplemented by identifying any documentation resulting from any investigation by Sterling as to an alleged cause and effect relationship between aspirin and Reyes Syndrome after October, 1981, if any such documents exist.

5. The documents described in interrogatory no. 10 shall be identified by defendant.

6. For interrogatory no. 12, defendant shall identify documents received from the National Institute of Health containing information relating to an alleged cause and effect relationship between aspirin and Reyes Syndrome.

7. For interrogatory no. 14, defendant shall identify documents received from the Center for Disease Control containing information relating to an alleged cause and effect relationship between aspirin and Reyes Syndrome.

8. For interrogatory no. 15, defendant shall identify documents sent to any state health department containing information relating to an alleged cause and effect relationship between aspirin and Reyes Syndrome.

9. For interrogatory no. 16, defendant shall identify documents received from any state health department containing information relating to an alleged cause and effect relationship between aspirin and Reyes Syndrome. Defendant may redact patient-identifying information from any such documents.

10. Interrogatory no. 19 is amended to delete the phrase beginning with "expressing concern", and shall be answered as amended.

11. Interrogatory no. 20 shall be answered to the extent that such information is now known by defendant, and shall be supplemented when and if further information becomes available.

12. Interrogatory no. 21 is amended to delete "in order to refute or support the FDA bulletin", and substituting therefor the words "upon receipt of the FDA bulletin", and shall be answered as amended.

13. Interrogatory no. 22 shall be answered if an affirmative response is provided for interrogatory no. 21, as amended by this Order.

14. Interrogatory nos. 26 and 27 shall be interpreted as requiring identification of non-employees who made independent tests or studies for Sterling, and also either current or former employees, any of which have communicated to Sterling opinions or beliefs as set forth in interrogatory no. 26. Subject to this interpretation, defendant shall identify the persons and documents, if any, as requested in interrogatory nos. 26 and 27.

15. Interrogatory no. 30 is amended by adding the words "and aspirin" at the end of the first sentence, and by deleting the last sentence. Subject to these amendments, interrogatory nos. 30 and 31 shall be answered.

16. Interrogatory no. 32 is amended to request that defendant identify employees and agents who attended meetings concerning the alleged relationship between Reyes Syndrome and aspirin, except that defendant is required to provide no more than ten (10) names. Defendant shall answer this interrogatory as amended.

17. Interrogatory no. 33 is amended to request annual gross sales information, and shall be answered as amended.

18. With respect to interrogatory nos. 34 through 105, all questions asking whether Sterling is or was aware of a published article are amended by deleting all language

which purports to pharaphrase the contents of said article. All questions in this series which include the language "in order to refute or support" a publication are amended to delete the quoted language and substitute therefor the words "upon receipt of the" publication. Defendant shall supplement its response to interrogatory nos. 34 through 105, as amended herein, and subject to the court's foregoing Orders concerning discovery from defendant of information known or received by defendant before or after plaintiff's alleged injury.

19. Interrogatory no. 106 is amended to say "describe the corporate procedures used by Sterling Drug from 1976 through 1981 to determine what information was included in the package insert labeling of Bayer aspirin, and Bayer aspirin for children". Defendant shall answer interrogatory no. 106 as amended herein.

20. Interrogatory no. 112 shall be answered.

21. Interrogatory no. 114 is amended to say "please state whether or not there is a department of officers and/or employees within Sterling Drug and/or Glenbrook Laboratories whose responsibility is to keep abreast of current scientific and medical developments, knowledge and literature pertaining to Bayer aspirin" and shall be answered as amended.

22. For interrogatory no. 115, subsection c is amended by deleting the words "since 1963" and substituting therefor the words "from 1976 until the present ", and shall be answered as amended.

23. For interrogatory no. 120, defendant shall supplement its previous response by providing a copy of any report made by Dr. John Crocker.

24. Interrogatory no. 121 is amended to request annual gross sales information, and shall be answered as amended.

25. Interrogatory no. 122 is amended to request annual profit information, and by deletion of subsection c. As amended, interrogatory no. 122 shall be answered.

26. Interrogatory no. 123 is amended to say "does Sterling Drug claim that aspirin does not cause Reyes Syndrome?", and shall be answered as amended.

27. Interrogatory no. 127 is amended to say "is Sterling Drug aware of a pilot study on Reyes Syndrome which was published in January of 1985?", and shall be answered as amended.

28. A ruling is reserved with respect to interrogatory nos. 128 and 129, and no ruling will be made unless the matter is again brought to the attention of the Court on or about June 1, 1988.

IT IS FURTHER ORDERED that defendant shall supplement its responses to plaintiff's first set of written interrogatories as follows:

29. Interrogatory no. 11 shall be answered for the time period from 1960 through 1981.

30. Interrogatory no. 36 shall be answered to the extent that such information remains reasonably available.

31. For interrogatory no. 40, defendant shall supply copies of all labeling and packaging inserts as requested, and shall otherwise respond to said interrogatory to the extent that the requested information can be determined.

32. Interrogatory no. 42 is amended by deleting the phrase "in full and complete detail" and shall be answered as amended.

33. For interrogatory no. 47, defendant shall identify all persons who, prior to 1982, have made claim against defendant for damages resulting from the use of aspirin and allegedly producing Reyes Syndrome.

34. Defendant shall answer interrogatory no. 48, except that the information sought under subsections (e) and (h) may be omitted.

35. The response to interrogatory no. 52 shall be supplemented by providing additional information identifying the insurer and amount of any excess coverage in addition to the basic $10 million dollar policy with Royal Insurance Company.

36. Defendant shall respond to interrogatory no. 58.

IT IS FURTHER ORDERED that with respect to documents previously produced by defendant for inspection and copying by plaintiff, said production of documents shall be supplemented by production of all additional documents identified or described in the supplemental responses to interrogatories as required in the foregoing Order, and within the time frame and subject matters set forth in this Order.

IT IS FURTHER ORDERED that with respect to documents which defendant seeks to withhold from discovery under claims of attorney-client privilege, attorney-work product privilege, or any other basis for denying such discovery, defendant shall describe such category of documentation sufficiently for plaintiff to agree that such documents may be withheld, or alternatively, for plaintiff to demand that such documents be presented for in-camera inspection by the Court pending a decision on whether any such materials are discoverable.

IT IS FURTHER ORDERED that the motion by plaintiffs for an Order vacating the protective order entered in this action on May 19, 1987 is hereby denied.

IT IS FURTHER ORDERED that the Court will receive and consider additional briefs from the parties concerning plaintiffs' request for an Order that they be provided with copies of depositions of all employees, former employees, consultants and experts for Sterling with

respect to Reyes Syndrome, and a ruling on said request is withheld pending consideration of additional arguments.

IT IS FURTHER ORDERED that defendant shall provide additional responses as required by this Order within sixty (60) days after the date this Order is entered and filed.

Dated: 4 January 1988

BY THE COURT:

/s/ PATRICK J. MADDEN
Hon. Patrick J. Madden

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
BRANCH 29

JACQUELINE FOX, et al.,
Plaintiffs,

vs.

STERLING DRUG, INC., et al,
Defendants.

Case No. 687-394

EXCERPT FROM REPORT OF PROCEEDINGS OF JULY 20, 1988

Before the
HON. GARY A. GERLACH,
Circuit Court, Br.29,
Presiding.

[THE COURT:] I guess I've really -- I understand your position and I understand the plaintiffs' position, and I am going to tell you what I am going to do. I was talking about the general purpose of the work product rule before, and sometimes when you start looking at each individual issue, you lose the forest from the trees. The fact is that we have a liberal discovery policy in Wisconsin and in the federal system and, as a matter of fact, probably in most states. The Wisconsin Appellate Court in *Meunier vs. Ogurek*, 140 Wisconsin 1987, went so far as to state "Even material classified as work product would be ordered discoverable *if discovery would be unnecessarily frustrated* by not providing that."

In that case, I believe there were names of witnesses who had made statements that were in the possession of one side obtained by the other side in anticipation of litigation for purpose of trial. The court ordered that they

must turn over the names because it would unnecessarily frustrate the purpose of discovery even though it was work product, so Wisconsin allows for exceptions even if technically items are classified as work product.

With regard to the attorney-client privilege. *State ex rel Dudek vs. Circuit Court*, 34 Wisconsin 2d 559 has stated that Wisconsin construes that privilege very narrowly. The reason it is construed narrowly is because it is an absolute privilege. There must be some protection against a party retaining a lawyer and giving him two incriminating documents and protecting it under the guise of the attorney-client privilege.

On the other hand, there is a good reason for the privilege, and that is, of course, to have full communication from the plaintiff to the attorney without fear of having facts developed without giving the attorney the opportunity to, without privilege, evaluate all of the facts and prescribe a course of action based on all the communications the client should feel free to divulge.

We don't have a situation of one diligent party obtaining a great deal of information only to have this information turned over as a windfall to a nonproductive, unskilled, lazy attorney who is going to benefit from all this work.

That's another reason for the work product rule, to encourage diligence on the part of an attorney and not have him turn over his work product to the other side who hasn't taken one step to learn anything about the case or establish a case. That's not the case here.

The plaintiffs have put in a great deal of time in this just as the defense has, both for their own reason, for their own perspectives. The ultimate purpose of the discovery rule is to outline the issues, discover the truth and to allow each side to have full knowledge of what the facts are so that the case can be either settled appropriately or tried fairly with all facts on the table.

With that in mind, I think also keeping in mind, as I stated, the court does not have the resources to go through 2,000 separate documents to determine whether privilege exists. I think that even a referee being appointed is going to result in the same thing. I am still going to have to review each document. Otherwise, someone other than the court is making a decision on whether the privilege attaches.

I believe that Mr. Habush's proposal is adequate and I think should be incorporated, and I don't believe that there will be any prejudice to the defendants, because any of the information that the plaintiffs learn from reviewing these documents is protected unless the court orders that no privilege attaches to those documents.

Any use of any information from the documents by the plaintiff which are determined to be privileged would be forbidden.

There might be some area for some problems where information is already known by the plaintiffs from some independent course source and that same information is found in the documents that are privileged. It's going to be the plaintiffs' burden to show, if they are going to use that information, it's been obtained independently and not from a review of these records, but I believe that the plaintiff can practically narrow the issues by having an opportunity to determine which of the documents, Number 1, they would like to have admitted into evidence, and then, Number 2, determine whether there is a dispute on that between those any of those documents.

If there isn't, they can be stipulated into evidence. If there is a dispute, then the court can determine as a matter of law whether those documents are privileged or not, but I think that will certainly narrow the task at hand, and as an officer of the court, I am satisfied that Mr. Habush and his co-counsel will abide by the court's order that none of the information that he reviews will be

divulged without further order of the court to any party or any person whatsoever.

This, of course, can be accomplished with a defense counsel present if defense wishes to be present while the review is being made. That certainly is appropriate. I think that's something you'd have to work out between yourselves as to time of going through these documents, and the defense counsel, if defense counsel wants to be present, I think you can mutually agree on a time to do that, and when you have completed that, return to the court with the documents that are in issue, and then we will make a decision on those documents.

DISTRICT I

Office of the Clerk

COURT OF APPEALS

OF WISCONSIN

MARILYN L. GRAVES
Clerk

Madison, (Amended 12/16/88) December 14, 1988

To: FRANK A. SCHERKENBACH
RANDAL N. ARNOLD
SUSAN R. TYNDALL

MICHAEL J. BONESTEEL
ROBERT L. KAUFMAN
Santa Monica, CA 90406

ROBERT L. HABUSH

RICHARD C. NINNEMAN

Clerk of Circuit Court
Milwaukee, WI 53233

Hon. Gary A. Gerlach
Milwaukee, WI 53233

You are hereby notified that the Court entered the following opinion and order:

#88-2169-LV - Jacqueline Fox et al. v. Sterling Drug, Inc. et al. (L.C. No. 687-394)

Before Moser, P.J., Sullivan and Fine, JJ.

Sterling Drug, Inc. (Sterling) petitions the court for leave to appeal from the trial court's order compelling Sterling to produce certain documents for discovery. The Aspirin Foundation of America (AFA) petitions the court for permission to intervene in the petition for leave to appeal.

IT IS ORDERED that the petition to intervene is granted.

Having reviewed the petition for leave, the petition to intervene, the response, and the supporting memoranda, the court concludes that Sterling has failed to meet the criteria for permissive appeal enumerated in sec. 808.03(2), Stats.

IT IS FURTHER ORDERED that the petition for leave to appeal is denied.

The respondent filed a 58-page response to the petition. The response does not comply with Rule 809.19(8)(c), Stats. This is the second time in a one-month period that this law firm has violated Rule 809.19, Stats. The firm will be fined for its next violation.

IT IS FURTHER ORDERED that the response to the petition for leave to appeal is stricken.

Marilyn L. Graves

Clerk of Court of Appeals

DISTRICT I

Office of the Clerk

COURT OF APPEALS

OF WISCONSIN

MARILYN L. GRAVES
Clerk

Madison, December 14, 1988

To: FRANK A. SCHERKENBACH
RANDAL N. ARNOLD
SUSAN R. TYNDALL
ROBERT L. HABUSH
VIRGINIA M. ANTOINE
MARCIA L. GRINDER
BRUCE D. RYAN
LORIE J. SCHMIDT-PRAUL
R. BRUCE DICKSON
FRANK A. SCHERKENBACH

MICHAEL J. BONESTEEL
ROBERT L. KAUFMAN

Clerk of Circuit Court
Milwaukee, WI 53233

Hon. Gary A. Gerlach
RICHARD C. NINNEMAN
J. DENIS MORAN

You are hereby notified that the Court entered the following opinion and order:

#88-2180-W - The Aspirin Foundation of America, Inc. v. Cir. Ct. for Milwaukee Co. et al. (L.C. No. 687-394)

Before Moser, P.J., Sullivan and Fine, JJ.

The Aspirin Foundation of America (AFA) petitions the court of appeals to prohibit the trial court from requiring production in trial court case #687-394 of AFA prepared documents that are in the possession of Sterling Drug, Inc. A writ will not issue unless the duty of the court below is *plain* and the trial court's refusal to proceed within the line of such duty is *clear*. *Beaudry v. Panosian*. 35 Wis. 2d 418, 426, 151 N.W.2d 48, 52 (1967). The trial court's decision to order discovery was well reasoned and within

the confines of an appropriate exercise of discretion. AFA has not established grounds that would support issuance of a writ.

IT IS ORDERED that the petition for a supervisory writ is denied.

Marilyn L. Graves

Clerk of Court of Appeals

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, February 1, 1989

To

See Attached List

The Court today announced an order in your case as follows:

State ex rel. Sterling Drug, Inc.

v.

Circuit Court for Milwaukee County, the Hon. Gary A. Gerlach, Presiding, et al.

Case No. 88-2366-W

State ex rel. The Aspirin Foundation of America, Inc.

v.

Circuit Court for Milwaukee County, the Hon. Gary A. Gerlach, Presiding, et al.

Case No. 88-2180-W

On December 21, 1988 Sterling Drug, Inc. filed a petition seeking a supervisory writ prohibiting the circuit court for Milwaukee county, the Hon. Gary A. Gerlach,

presiding, from enforcing its November 10, 1988 order requiring the petitioner to produce for inspection by an adverse party in litigation pending in that court certain documents the petitioner claims are privileged. By order of December 22, 1988 the court stayed the November 10, 1988 order of the circuit court pending disposition of the petition for supervisory writ.

The petitioner did not first seek supervisory relief in the Court of Appeals; rather, it petitioned the Court of Appeals for leave to appeal the trial court's discovery order. On December 14, 1988, having concluded that the petitioner failed to meet the criteria for permissive appeal, the Court of Appeals denied leave to appeal.

The Aspirin Foundation of America had sought and obtained permission to intervene in Sterling Drug, Inc.'s petition for leave to appeal and it also petitioned the Court of Appeals for a supervisory writ prohibiting the circuit court from requiring the production of documents it had prepared and which were in the possession of Sterling Drug, Inc. The Court of Appeals denied the petition for supervisory writ, stating, "The trial court's decision to order discovery was well reasoned and within the confines of an appropriate exercise of discretion." On January 6, 1989, Aspirin Foundation of America filed a petition for review of the Court of Appeals order denying its petition for supervisory writ.

IT IS ORDERED that the petition of Sterling Drug, Inc., for a writ of prohibition is denied *ex parte*, pursuant to secs. (Rules) 809.71 and 809.51, Stats.

IT IS FURTHER ORDERED that the petition for review filed by Aspirin Foundation of America is denied. $50 costs to the respondents Fox.

IT IS FURTHER ORDERED that the stay of the circuit court order entered by the December 2, 1988 order of this court is vacated.

Marilyn L. Graves

Clerk of Supreme Court

Attorney RANDAL ARNOLD
Attorney SUSAN TYNDALL
Attorney FRANK SCHERKENBACH
788 N. Jefferson St.
Suite 500
Milwaukee, WI 53202

Attorney RICHARD C. NINNEMAN
Attorney HOLLIS E. WRIGHT
2100 Marine Plaza
Milwaukee, WI 53202

Attorney MICHAEL J. BONESTEEL
Attorney ROBERT KAUFMAN
P.O. Box 680
Santa Monica, CA 90406

Hon. GARY A. GERLACH
Milwaukee County Courthouse
Milwaukee, WI 53233

Attorney ROBERT L. HABUSH
Attorney MARCIA L. GRINDER
Attorney VIRGINIA M. ANTOINE
777 E. Wisconsin Ave., Suite 2200
Milwaukee, WI 53202

JAMES D. JEFFRIES
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

J. DENIS MORAN
Director of State Courts
P.O. Box 1688
Madison, WI 53701-1688

Attorney R. BRUCE DICKSON
Attorney BRUCE D. RYAN
Attorney LORIE J. SCHMIDT-PRAUL
1050 Connecticut Ave., NW 12 Fl.
Washington, D.C. 20036

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
BRANCH 29

JACQUELINE FOX, a minor, by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,
Plaintiffs,

vs.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,
Defendants.

Case No. 687-394

FILED
29 NOV 10 1988 29
GARY J. BARCZAK
CLERK OF COURTS

MEMORANDUM DECISION & ORDER

The plaintiffs have requested that this court compel the defendant, Sterling Drug, Inc., to produce documents pertaining to the relationship between aspirin use and Reyes Syndrome. Sterling Drug has asserted tht 1026 documents with hundreds of pages of attached writings in its possession are privileged because they are communications between attorney and client and/or work product. Sterling Drug also asserts that some of the documents are protected from discovery because of the academic freedom privilege and the *Noerr-Pennington Doctrine*.

The plaintiffs have claimed $10,000,000 in damages from the defendants for injuries sustained by Jacqueline Fox who on October 6, 1981, at age ten months old, was given Bayer Aspirin which was manufactured by Sterling

Drug and allegedly caused her to contact Reyes Sydrome. The plaintiffs calim that Sterling Drug was negligent in failing to properly warn the general public that there was any possibility of an adverse effect from taking aspiring for a child's fever who had either influenza or chicken pox. The plaintiffs also assert a claim of strict product liability that the aspirin was defective and unreasonably dangerous.

Sterling Drug has submitted to the court 11 categories of what it claims are privileged documents (Exhibit 1) as well as an 87-page index of the 1026 documents it claims are privileged. No document is dated earlier than November 13, 1980. The most recent document is dated October 29, 1987. Rather than reiterating the somewhat ragged procedural history in this case, I am satisfied that it is appropriate for the court to now engage in an *in camera* inspection of the documents that Sterling Drug claims are privileged.

Numerous cases have set our out variations of generalized rules regarding the application of the attorney-client and/or work product privilege. Unfortunately, the expression of these rules is a much easier task than their appliation. The only constant that can be derived from the cases is that the application of the rules regarding the attorney-client and/or work product privileges must be done on a case by case basis because the specific facts and issues of each case have a direct bearing on whether or not a particular privilege is applicable. See *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) and *State ex rel Dudek vs. Circuit Court*, 34 Wis. 2d 559, 582, 601 (1967).

It is also apparent that evaluation of whether or not a privilege is applicable must be done on a document by document basis. *Research Institute For Medicine and Chemistry, Inc. v. Wisconsin Alumni Research Foundation*, 114 F.R.D. 672, 675, 679 (W.D. Wis. 1987). Along with the index and documents themselves, this court has for

its consideration affidavaits of Attorney Kathryn Forgie, a partner in the law firm of Haight, Brown & Bonesteel, attorneys of record for defendant Glenbrook Laboratories, a division of Sterling Drug, Inc; Attorney Robert L. Kaufmann, a partner in the law firm of Haight, Brown & Bonesteel, attorneys of record for defendant Glenbrook Laboratories, a division of Sterling Drug, Inc; Attorney Kenneth Weiner, assistant general counsel for Sterling Drug and vice president of Glenbrook Laboratories, a division of Sterling Drug Inc; Attorney James H. Luther, general counsel and senir vice president for Sterling Drug, Inc; and Attorney R. Bruce Dickson, counsel to the Aspirin Foundation of America since 1981. Kaufmann has set forth in his affidavit the names of some 85 persons and their occupations who were identified in the documents submitted to the court for inspection. These affidavits are attached as Exhibits 2-5.

On November 7, 1980, the Mortality Morbidity Weekly Report (MMWR) published by the Centers for Disease Control and which is distributed to pharmaceutical companies, epidemiologists and scientists throughout the country discussed the studies done in Arizona, Ohio and Michigan which suggested a relationship between Reyes Syndrome and salicylates (i.e. aspirin) taken during an associated antecedent illness. At page 537 on the MMWR, an editorial note states in part:

> "Although the epidemiologic association between Reyes Syndrome and antecedent viral illness is well established, the estiology for this rare disease remains unclear. Several previous reports have suggested the possibility that medications taken during the antecedent illness of patients with Reyes Syndrome may play a role in the development of this disease, and aspirin is the 1 medication which has been mentioned frequently (citing reference materials dated as early as 1965)."

The MMWR also makes reference to a 1976 warning by the Food & Drug Administration regarding the use of

aspirin in combination with a viral illness stating at page 539:

> "In 1976, the Food & Drug Administration advised that, when treating children who developed vomiting associated with a viral illness, caution should be exercised in using acetaminophen, salicylates and antiemetics because of the suspicion that these drugs in combination with a viral illness, a possible cause of vomiting in children, might contribute to development of Reyes Syndrome."

The MMWR concludes at page 539:

> The results of these studies suggest that during certain viral illnesses the use of salicylates - even before the onset of vomiting - may be a factor in the pathogenesis of Reyes Syndrome. In view of these data, parents should be advised to use caution when administering salicylates to treat children with viral illness, particularly chickenpox and influenza-like illnesses."

Affidavits of Luther and Weiner claim that Sterling Drug became aware of the strong potential for litigation following the publication of the above-cited MMWR. They claim that once controversial studies are reported which potentially affect the safety of a product it is near inevitable that the Federal Drug Administration review of such reports will become the subject of regulatory and products liability litigation. When Sterling Drug was first informed of the MMWR publication, it immediately began to assess the validity of the surveys in part to determine their impact in the areas of aspirin safety, regulation, regulary litigation and potential products liability litigation. The initial assessment of the studies was undertaken by Dr. R. William Soller, Ph.D., Sterling Drug Director of Scientific Affairs, and Herbert Stander, M.S., Sterling Drug-Winthrop Institute Group LTD. Head of Biometrics Department, under the supervision of Monroe Trout M.D., Sterling Drug Corporate Vice President and Medical Director, and at the direction of James Luther, general counsel for Sterling. According to the affidavits of Luther and Weiner, the law firm of Covington & Burling was retained

for the purpose of representing Sterling with respect to the legal aspects of the Reyes Syndrome-aspiring matter. No date is set forth as to when Covington & Burling was retained. The affidavit of Dickson indicates he was counsel to The Aspiring Foundation of America since 1981 and served as counsel to members of The Aspirin Foundation on various matters since that time. He did not specify specifically what matters he represented members of the Association on as distinct from matters in which he represented the Aspirin Foundation. There is no evidence that Sterling Drug ever retained Dickson on its own behalf. Sterling Drug was a member of The Aspirin Foundation and Sterling's in-house counsel. Ken Weiner, was an officer and director of The Aspirin Foundation and a key member of the Foundation's Legal and Legislative Affairs Committee.

Sterling Drug was not a names party in any specific litigation until the case of *Bunch v. Dow Chemical* was filed in the Suprior Court of the State of California on November 15, 1983. This case is also a claim for damages based on the alleged association between aspirin and Reyes Syndrome. The Aspirin Foundation of America was a co-defendant in that case. Sterling Drug subsequently became a defendant in similar litigation in the case of *Bastoe v. Sterling Drug* filed in the United States District Court for the Southern District of Mississippi, Civil Action No. S85-0528, and *Phillips, et al. v. Sterling Drug* filed in the United States District Court for the Eastern District of Oklahoma, Civil Action No. 85-432-C. According to Dickson's affidavit, in the spring of 1982, the FDA initiated an administrative proceeding to determine whether to require the Reye's Syndrome labale warnings. On May 17, 1982, the Public Citizen Health Research Group (HRG) filed a civil action in the United States District Court for the District of Columbia seeking an order declaring that aspirin products were misbranded under the FDCA and compelling the FDA to promulgate a rule regarding the contents of labels on aspiring products. *The Public Citizen Health Research Group et al, v. Hayes*, No. 82-1346.

Sterling Drug was not a party to that action. However, The Aspirin Foundation of America, an incorporated trade association of principle producers of aspirin and aspirin-containing products of which Sterling Drug was a member, intervened in the action in March of 1983.

Luther, Weiner, Dickson and Forgie all set forth conclusions in their affidavaits to the effect that the various communications under consideration were in fact privileged either as communications between attorney and client and/or work product.

The plaintiffs assert that any documents and/or memorandum of conversations regarding the association between aspiring use and Reyes Syndrome subsequent to November 7, 1980 until the present are relevant by showing (1) admissions on the part of the defendant that there is a causal connection between aspirin use and Reyes Syndrome; (2) admissions of negligence on the part of the defendant; (3) product defect with respect to the plaintiffs' strict product defect with respect to the plaintiffs' strict product liability claim; (4) direct evidence of causation, and (5) for impeachment purposes. The plaintiffs also assert that evidence in existence between November 7, 1980 and October 6, 1981 is relevant to establish that it was foreseeable to the defendant that the children using aspirin had a risk of contracting Reyes Syndrome. Plaintiffs also assert such documents also would have a tendency to establish the defendant's response after lerning that there was an association between aspirin use and Reyes Syndrome and thus are relevant to establish negligence on the part of the defendant. The plaintiffs have not shown anything other than a generalized need for the documents. No showing of substantial need or undue harship has been made.

In the *Dudek* case, the court made clear that the basic objective of our trial system is the ascertainment of the truth and that justice can more likely be done if there is a preliminary determination of the truth of facts. The court also stated at page 576:

> "Pretrial discovery is designed to formulate, define and narrow the issues to be tried, increase the chances for settlement, and give each party opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial. Thus, the function of pretrial discovery is to aid, not hinder, the proper working of the adversary system.

In *Meunier v. Ogurek*, 140 Wis. 2d 782, 790 (1987), the court reiterated the *Dudek* objectives of pretrial discovery and also concluded that 'discovery is designed to eliminate surprise'."

Because of the magnitude of this case which counsel has estimated will take three months to try, I consider the objectives of pretrial discovery set forth in *Dudek* a *paramount* consideration in determining whether or not Sterling Drug's claimed privileges are applicable to the documents in question. Furthermore, where no Wisconsin decisions are in point as to a particular issue, federal court cases have been reviewed. See *Meunier v. Ogurek*, *supra*, at p. 788.

ATTORNEY CLIENT PRIVILEGE

There is no question but that the attorney-client privilege must be construed very narrowly due to the fact that once the protection is afforded the privilege is absolute. *Dudek*, *supra*, at p. 579. A balance must be reached to accommodate the policy protecting lawyer-client communications against the right of litigants to have full access to all reasonable means of determining the truth. *Jacobi v. Podevels*, 23 Wis. 2d 152 156-57 (1964). The party claiming the privilege has the burden of establishing the existence of the privilege. *Dyson v. Hempe*, 140 Wis. 2d 792, 802 (Ct. App. 1987); 2 Louisell & Mueller, Federal Evidence Section 209 p. 754 (1982). A more showing that a communication

between a client and attorney is insufficient to warrant a finding that the communiction is privileged. *Jax v. Jax*, 73 Wis. 2d 572, 581 (1976).

Sec. 905.03 Wis. Stats. codifies the lawyer-client privilege in Wisconsin. This statute precludes the disclosure of confidential communications between a client and his lawyer or their representatives for the purpose of facilitating the rendition of professional legal services to the client. Under this statute, the client may be a corporation. A communication is "confidential" if it is not intended to be and not in fact disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. There is no privilege if the services of the lawyer were sought or obtained to enable or aid any one to commit a plan to commit what the client knew or reasonably should have known to be a crime or fraud.

The index to the claimed privileged documents, affidavits and the documents themselves of the defendant Sterling Drug must demonstrate that the documents satisfy the requirements of the attorney-client privilege which are set forth in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass., 1950) quoted with approval in *Dyson v. Hempe, supra*, at p. 812:

> "The (lawyer-client) privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a mamber of the bar of a court, or his subordinant and (b) (in connection with this communication is acting as a lawyer; (3) the communucation relates to a fact of which the lawyer was informed (a) by his client (b) without the presence of strangers (c) for the purposes of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal ploceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."

The purpose of the attorney-client privilege is to promote full disclosure by a client to his attorney by protecting the confidentiality of communications between them. Only if the client is assured that the information relayed in confidence when seeking legal advice will be immune from discovery will he be encouraged to disclose fully all relevant information to his attorney.

Nonetheless, the showing required by a party resisting discovery on the basis of attorney-client privilege is set forth in *International Paper Co. v. Feberboard Corp.*, 63 F.R.D. 88 (D. Dela., 1974) at pp. 93-34:

> "It is incumbent on one asserting the privilege to make a proper showing that each of the criteria set forth in the *United Shoe* case existed . . . such showing is usually by affidavit in which the documents are adequately listed and described showing (a) the identity and corporate position of the person of person interviewed or supplying the information, (b) the place, approximate date, and manner of recording or otherwise preparing the instrument, (c) the names of the person or persons (other than stenographical or clerical assistants) participating in the interview in preparation of the document, and (d), the name and corporate position, if any, of each person to whom the contents of the document have heretofor been communicated by communicated by copy, exhibition, reading or substantial summarization.
>
> A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. Unless the affiant is precise to bring the document within the rule, the court has no basis on which to weigh the applicability of the claim of privilege. An improperly

asserted claim of privilege is no claim of privilege at all.

> In short, a party resisting discovery on the ground of the attorney-client privilege must by affidavit show sufficient *facts* as to bring the identified and dwcribed documents within the narrow confines of the privilege. Nor will submitting a batch of documents to the court *in camera* provide an adequate or suitable substitute because the court is often without information of what the document concerns or how it came into being or other relevant information which would enable it to determine whether the documents are privileged."

In this case, the affidavits, index and documents themselves do not sufficiently describe the communication to warrant the application of the attorney-client privilege as to a number of documents. See for example documents 664, 671, 710, 738-743, 745, 755-761, 763-768, 770-778.

There is no case in Wisconsin which has determined the scope of the attorney-client privilege in the corporate context. However, I agree with the plaintiffs that Sterling Drug must meet the criteria used in *Upjohn v. United States, supra,* at p. 395 in determining whether or not the attorney client privilege applies in the corporate context: (1) the communications at issue must have been made by the corporation's employees to the corporation's counsel acting as such; (2) the communications must have been made at the direction of corporate superiors in order to secure legal advice from counsel; (3) the communications must have been made so that the corporation's counsel could determine the nature and extent of the corporation's legal rights and so that the corporation could secure legal advice with resopect to those rights; (4) the communications must have concerned matters within the scope of the employees's corporate duties; (5) the information provided by the employees must not have been previously known to the corporation;s "upper echelon management"; (6) the corporation and the employees had to have been aware of the legal implications of the information which was being provided; and (7) the corporation must have considered

the information confidential when it was provided and was kept confidential by the company.

The term "professional legal services" is not defined in the Wisconsin Statutes. I do agree with the plaintiff that the attorney-client privilege does not protect communications which relate to business matters. In *First Wisconsin Mortage Trust v. First Wisconsin Corp.*, 87 F.R.D. 160, 174 (E.D. Wisconsin 1980), the court stated:

> "The attorney-client privilege protects only communications pertaining to legal assistance and advice and does not extend to business advice given by an attorney to a client or to interclient communications designed to communicate only business or technical data."

In this case, there is no question that Sterling Drug had legal concerns regarding the alleged association of aspirin and Reyes Syndrome. However, many of the documents reflect scientific, medical, health and economic concerns. Many documents reflect a combination of these concerns, the majority of which consist of technical data.

In determining whether a communication between attorney and client constitutes the rendition of professional legal services, the court must look to the communication itself and apply the privilege to those that are primarily legal in nature, while denying it to those which are primarily business or technical in nature. In *Hercules v. Exxon Corp.*, 434 F. Supp. 136, 147-48 (D. Dela. 1977) the court stated:

> "If the primary purpose of a communication is to solicit or render advice on nonlegal matters, the communication is not within the scope of the attorney-client privilege. Only if the attorney is "acting as a lawyer" – giving advice with respect to the legal implications to a proposed course of conduct – may the privilege be properly invoked. In addition, if a communication is made primarily for the purpose of soliciting legal advice, an incidental request for business advice does not vitiate the attorney-client privilege.

> The attorney-client privilege does not protect technical information such as the results of research, tests, and experiments communicated to the attorney not calling for a legal opinion or interpretation . . . "

Confidential information between Sterling Drug and its counsel is privileged only if the information was provided *primarily* for the purpose of seeking legal and not business advice.

In this case, the majority of documents which Sterling Drug claims protected by the attorney-client privilege were not provided primarily for the purpose of seeking or rendering legal advice. In fact, a letter dated October 19, 1982 from Luther, Senior vice-president and general counsel for Sterling Drug, to the International Science Exchange states in part:

> "Sterling Drug is interested in a full and independent examination of the alleged association between Reyes Syndrome and aspirin because we believe that the issue has become politicized and is not being decided on firm scientific grounds. Our desire to support this effort is not conditioned on any given outcome since our *long term corporate interests* would be severely damaged if we continued to sell a product which could cause injury because its labeling did not warn against use in certain situations." Document No. 1039 (Emphasis added)

There is no question that legal and business advice are inextricably interwoven in this case. However, a review of all of the documents reflects an overall concern on the part of Sterling Drug and the Aspirin Foundation regarding scientific, medical, health and economic (i.e. business) matters at least equal to or greater than any legal concerns. Luther's statement above exemplifies this conclusion as do the purposes for which the Aspirin Foundation was created. The objective and purpose of the Aspirin Foundation were "to facilitate and encourage an understanding of the potential health effects of aspirin based upon sound

data and good science, and to collect and disseminate information regarding the benefits of aspirin." See documents 651, 717, 736 at p. 12. Its concerns in the area of public relations, legislative influence and medical and scientific issues were equal to or greater than a ny specific legal concerns. See document 600, 714, 717, 736. Its board of directors and officers consisted of numerous representatives of major drug companies whose interests were not perceived as being necessarily consistant. See document 714 and Dickson retainer resolution document 677.

A communication between an attorney and client made for the purpose of obtaining legal device must be confidential. Sterling Drug must show that no communications it claims covered by the privilege were intended to be revealed to third persons or in fact were revealed to third persons. The legal advice from an attorney to a client is protected by the privilege only if it is based on or tends to reveal confidential information furnished by the client. Any advice based on public information or information provided by a person outside Sterling Drugs does not amount to a "confidential" client communication and therefore is not protected by the attorney-client privilege.

Third party communications are protected by the attorney-client privilege if the client and the third party have a common interest. The term "common interest" is not defined under the Wisconsin Statutes. Co-defendants may share privileged information without fear of waivery under the "common defense rule". *Weil Ceramic and Glass Inc. v. Work*, 110 F.R.D. 500, 503 (E.D. N.Y. 1986); *United States v. McPartlin*, 595 F. 2d 1321, 1336 (7 Cir.) cert. denied, 444 U. S. 833 (1979). However, where there is a non-party client, there must exist eigher a duty on the part of one "client" to the other, or a direct transaction between two clients which necessitates the services of an attorney who serves both parties, the key consideration being that the nature of the common interest is identical and legal. *Research Institute of Medicine and Chemistry v. Wisconsin Alumni Research Foundation, supra*, at p. 676.

In *Duplan Corporation v. Deering Millican, Inc.*, 397 F. Supp. 1146, 1176 (D. S.C., 1975) the court stated:

> "Thus, where there is no legal interest (duty or direct transaction, between the two clients of the attorney). the mere interest of a non-party client in legal transactions between the prime client and outsider is not sufficient to prevent a waiver of the attorney-client privilege. This is true no matter how commercially strong the non-party client's interest is, or how severely the non-party client may be legally affected by the outcome of the transaction between the prime client and an outsider."

The attorney-client privilege must be "strictly confined within the narrowest possible limits." *United States v. Lawless*, 709 F. 2d 485, 487 (7 Cir. 1983) Therefore, in this case, Sterling Drug has not met its burden in establishing that communications between Sterling Drug or its counsel and The Aspirin Foundation of America or its counsel are protected under the attorney-client privilege except those communications made with specific reference to the *Bunch* litigation because no legal interest between them has been shown. In *Bunch*, there is a claim of concert of action by co-defendant's Sterling Drug and the Aspirin Foundation entitling them to the attorney-client privilege for communications regarding legal advice between them.

Although Sterling Drug may have been interested in the HRG litigation and FDA regulation from a commercial standpoint and certainly stood to be legally affected, the Aspirin Foundation had no *duty* to intervene on behalf of Sterling Drug based on the affidavits and documents submitted to the court. Likewise, no duty existed or direct transaction occurred between Sterling Drug and the Aspirin Foundation entitling either to protection of the privilege regarding the actions of the FDA.

WORK PRODUCT PRIVILEGE

It is clear that the attorney-client privilege does not apply to what is defined in Dudek as lawyer's work product which "consists of the information he has assembled and

the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means". *Dudek*, *supra*, at p. 579, 589.

Sterling Drug has claimed many of the documents provided to the court to review are privileged pursuant to the work product doctrine. Sec. 804.01 (2) (c) Wis. Stats. states in part that work product consists of "documents and cangible things . . . prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative".

The burden is on the party claiming work product protection of establishing that the documents sought to be protected come within the doctrine in the first instance. Only when documents are classified as work product must the party moving for discovery establish substantial need of the documents in preparation of the case and that he is unable without undue hardship to obtain the substantial equivalent of the documents by other means. *Dudek*, *supra*, at p. 589, 591 and Sec. 804.01 (2) (c) Wis. Stats.

In *Dudek*, the court stated:

> "This broad definition of lawyers' work product requires that most materials, information, mental impressions and strategies collected and adopted by a lawyer after *retainer* in preparation of litigation and relevant to the possible issues be *initially* classified as work product of the lawyer and not subject to inspection or discovery unless good cause for discovery is shown." (Emphasis added)

It should be noted parenthetically that there is a distinction between opinion work product consisting of a lawyer's mental impressions conclusions, opinions or legal theories concerning *the* litigation and ordinary work product such as reports of outside consultants and experts. See *Dudek*, *supra*, at pp. 602-603; Sec. 804.01 (2) (c) Wis. Stats. The former is protected from disclosure regardless of the

need and hardship to the party seeking discovery. The latter, depending on how close it is related to an attorney's opinions requires a commensurate level of need and hardship established. In this case, no distinction or balancing of the species of work product versus the degree of need and hardship need be made because the plaintiffs have not shown sufficient need or hardship for even the most ordinary work product.

In the context of this case, the work product privilege does no attach except where Sterling Drug has established in the first instance that the document was prepared in contemplation of or for use in some *specific* litigation in which it reasonably anticipated being and is still a party. No Wisconsin cases discuss the term "anticipation of litigation" in any detail.

In 8 Wright & Mueller, *supra*, it is stated:

> "Prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced. Thus, the test should be whether, in light of the nature of the document and the factual situation in a particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation."

In determining whether materials sought to be withheld were prepared in anticipation of litigation, it has been held that there must be a "substantial probability that litigation will occur and that commencement of such litigation is imminent."*Home Insurance Co. v. Ballinger Corp.*, 74 F.R.D. 93, 101 (N.D. Ga., 1987); See also *Jacobi v. Podevels*, *supra*, at p. 155. In *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1033 (N.D. Ga., 1974), the court stated the following test:

> "The probability that some *particular* litigation will occur must be substantial before a

> document may be deemed to be "in anticipation of litigation." . . . Therefore, the ore fact the a particular action . . . has a likelihood of bringing about litigation at some time in the future is not a sufficient showing. The probability must be substantial, and the commencement of litigation must be imminent. Phrased another way, *some particular litigation must be contemplated at the time the document is prepared.* (Citation omitted) (Emphasis added)."

In this case, I am not satisfied that the publication of the November 7, 1980 MMWR suggesting caution when giving aspirin to children with viral illness warranted the conclusion by Sterling Drug that the probability of litigation was substantial and its commencement imminent. The MMWR references studies as early as 1965 indicating an association of aspirin and Reyes Syndrome and a 1976 FDA caution when giving aspirin to children in combination with a viral illness. The 1980 MMWR publication could not have been new information on this subject warranting a conclusion that litigation was imminent. The documents themselves reveal that Sterling Drug was concerned with convincing the FDA that the studies in the MMWR were based. In fact, the majority of documents assembled by Sterling Drug counsel consists of technical data and research for use in convincing the FDA on an administrative level that new objective studies should be undertaken before and rules were issued requiring a warning on aspirin products concerning any association of aspirin with Reyes Syndrome and the specific wording to be used for such warning in the event such rules were mandated by the FDA. Many of the documents denominated work product were gathered in the ordinary course of business rather than in anticipation of any specific litigation.

The case of *HRG v. Hayes* filed on May 17, 1982 did not name Sterling Drug as a party and although The Aspirin Foundation of America intervened in March of 1983, Sterling Drug still had no reason to believe that

specific litigation was imminent with respect to it. Based on the record, I am satisfied that Sterling Drug has not established that any materials gathered prior to the filing of *Bunch v. Dow Chemical* on November 5, 1983 can be denominated work product gathered in anticipation of any specific litigation.

Even assuming that it was reasonable for Sterling Drug to anticipate imminent litigation after the November 7, 1980 MMWR publication, the work product doctrine would not be applicable to the work product of past, closed litigation.

The purposes of the work product doctrine set forth in *Dudek* at p. 590-1 are (1) to protect the mental processes and privacy of attorneys preparing for litigation from unwarranted interference by adverse parties; (2) to prevent laziness in preparation for trial; (3) to encourage diligent investigation of facts and law in anticipation of litigation; and (4) to curb sharp practices which may be utilized by unethical lawyers.

As stated in *Research Institute For Medicine and Chemistry, Inc.*, at p. 680, "when the litigation for which (work product) was prepared is at end, the purpose of the rule has been fulfilled and the need to protect the material from disclosure no longer exists". Therefore, I will not recognize work product claims except with regard to the current case or other pending litigation which include the *Bunch* and *Bastoe* cases. It is my understanding the *Phillips* case has been settled and is no longer active. The *HRG v. Hayes* case was completed in 1986 and the regulatory argument with the FDA was over when the warnings Sterling Drug resisted were voluntarily agreed to in February of 1985.

Even assuming that the purposes of the work product doctrine would be served by application in this case to past, closed litigation. I am satisfied that failure to produce work product from completed litigation would

unnecessarily frustrate the objectives of pretrial discovery. In *Meunier v. Ogurek*, 140 Wis. 2d 782, 790 (1987), the court clearly held that even where tangible evidence was classified as work product, the privilege can be overcome where the objectives of pretrial discovery are unnecessarily frustrated *regardless* of any showing of good cause by the party seeking discovery.

Providing the plaintiff with all opinion and ordinary work product that was generated for all litigation that has been closed does not violate any purposes of the work product doctrine. Furthermore, failure to provide this information would unnecessarily frustrate the objectives of pretrial discovery. Attorneys for Sterling Drug are not being subjected to unwarranted interference nor will production discourage diligent investigation, encourage laziness by opposing parties or allow for sharp practices by unethical lawyers. On the contrary, release of this information will define and narrow the issues to be tried, increase the chances for settlement and allow for a fully informed resolution of the case.

Sterling Drug's claim that materials gathered by Dickson, counsel for the Aspirin Foundation, on Sterling Drug's behalf or on behalf of The Aspirin Foundation are entitled to protection under the work product doctrine is misplaced. Sterling Drug has no standing to object to production of what may be work product gathered by Dickson on behalf of the Aspirin Foundation. As to materials claimed to be gathered by Dickson on behalf of Sterling Drug, the affidavits and documents themselves do not establish that Dickson was ever retained by Sterling Drug for any specific case. Those materials were not gathered for Sterling Drug in anticipation of any specific litigation.

Even if Sterling Drug could be considered a "client" of Dickson because it was a member of the Aspirin Foundation when the Aspirin Foundation intervened in *HRG v. Hayes*, that litigation is closed. Finally, Dickson makes

no claim in his affidavit that he represents Sterling Drug with regard to any prior specific case or pending litigation in which Sterlingdrug is a party. The purposes of the work product doctrine would not be compromised by denying protection of the privilege to Dickson's materials. Further, to prevent the production of these documents to the plaintiffs would unnecessarily frustrate the objectives of discovery.

The plaintiffs have conceded that any documents generated subsequent to November 7, 1980 and which concern the instant case or other actual Reyes Syndrome litigation in which Sterling Drug is a party are privileged. Therefore, any documents specifically prepared for the *Bunch*, *Bastoe* or this case would be protected regardless of whether they constituted opinion work product or ordinary work product.

While much of the information gathered after November 15, 1983 may have some tangential application to the pending cases mentioned above, I can in no way determine whether the documents submitted were gathered for those cases unless there is specific reference made in the document itself.

CONCLUSION

I do not believe it is necessary to set forth each and every document with a specific reason for its production or nonproduction. I believe that the preceding statement of my opinion as to the law and principles involved in this case is a sufficient exercise of discretion with regard to all of the documents. I have reviewed the documents submitted and will briefly discuss each category and set forth the number of the document which I have determined to be protected by privilege. I assume all documents preceding November 7, 1980 have been provided to plaintiffs' counsel as no documents are in my possession which precede that date.

With regard to Category 1, communications between Sterling legal department and retained outside counsel; Category 3-A, communications among Sterling counsel and

Sterling officers and employees; Category 5-A, memoranda, minutes, agendas and notes by and for counsel, of meetings between Sterling counsel, Sterling officers, employees, and consultants related to on-going or in anticipation of litigation; Sterling Drug has simply claimed "(attorney-client privilege); (work product doctrine)" without specifying its claim of privilege to any one document. Because the attorney-client privilege must be determined by evaluating the document itself, a representative for Sterling Drug shall specifically delineate which documents it claims in those categories to be privileged attorney-client communications. Serious consideration should be given to the principles of law I have adopted as applicable to this case and to the fact that the attorney-client privilege must be *narrowly* construed. This designation shall be provided to the court no later than November 28, 1988.

The documents which Sterling Drug claims are protected by the work product doctrine and which specifically relate to the *Bunch*, *Bastoe* or this litigation are the following: 122, 458, 476, 484, 492, 494, 709, 722, 723, 724, 728, 732, 735, 736, 754, 780, 785, 787, 792, 793, 808, 811 and 816. These are the only documents claimed to be work product which shall be protected from disclosure. All of them refer to the *Bunch* litigation. No documents were found relating to the Bastoe or this litigation.

All documents in Category 2, communications between AFA counsel and AFA member companies and representatives, shall be turned over to the plaintiff with the exception of work product specifically related to the *Bunch* litigation in which the Aspirin Foundation is still a defendant. This also applies to documents in Category 3-B, communications between AFA counsel and AFA officers and employees. This also applies to Category 4-A and B, communications relating to Sterling Drug, AFA and other members' consultants. This also applies to Category 5-B, memorandum, minutes, agendas and notes, by and for counsel, of meetings between AFA counsel, committees,

officers or consultants.

All items in Category 6 shall be turned over to the plaintiff as Wisconsin does not recognize the researcher's privilege. Further, no researcher has been subpoenaed, and there is no need to determine a researcher's right to privacy and academic freedom until and unless such subpoena is issued.

All items in Category 7 which are objected to under the *Noerr-Pennington Doctrine* and the First Amendment shall be turned over to the plaintiffs. This doctrine has not been recognized in Wisconsin, and in any event, this is a products liability and not an antitrust case. Even if the plaintiffs were attempting to impose liability on the defendant for its lobbying and petitioning activities, the application of the *Noerr-Pennington Doctrine* would not preclude discovery on that issue.

All of the documents in Categories 8 and 10 are objected to on the ground of work product alone and therefore shall be turned over to the plaintiffs with the exception of any documents specifically related to the *Bunch* case set forth above.

With regard to Category 9, Sterling Drug has not met its burden in establishing any of these documents are protected by the attorney-client privilege. Sterling Drug has not submitted any evidence to establish that it was a client of the Proprietary Association's counsel. These documents shall be turned over to the plaintiffs.

No specific privilege is asserted for two miscellaneous documents (1238, 9999) in Category 11 and they therefore shall be turned over to the plaintiffs.

The following documents have been submitted with no privilege asserted and therefore shall be turned over to the plaintiff: 31, 129, 219, 248, 271, 372, 384, 516, 604, 634, 660, 762, 881, 938, 1028, 1052, 1057, 1172, 1174, 1175, 1190, 1191, 1195, 1196, 1198, 1199, 1206, 1207, 1211, 1214,

1219, 1221 and 1222.

The following documents have been listed in the index and claimed to be privileged but have not been provided to the court: 408, 527, 532, 534, 546, 585, 619, 831, 855, 862, 977, 979, 1032, 1041, 1137, 1166, and 9999.

Sterling Drug shall produce those documents to the court no later than November 28, 1988.

Sterling Drug shall notify the court no later than November 28, 1988 whether or not any documents exist having any of the following numbers set forth in Exhibit 7.

THEREFORE, IT IS ORDERED that all documents, except those for which a determination must still be made with respect to the attorney-client privilege or otherwise determined privileged by this court, shall be turned over to the plaintiffs at 9:00 a.m. on November 28, 1988 in Room 413 Courthouse.

BY THE COURT:

/s/ GARY A. GERLACH
Gary A. Gerlach

Dated at Milwaukee, Wisconsin
this 10th day of November, 1988.

CONFIDENTIAL
FOR USE IN FOX LITIGATION ONLY

CATEGORIES OF PRIVILEGED DOCUMENTS

1. Communications between Sterling legal department and retained outside counsel. (attorney-client privilege; work product doctrine)

2. Communications between AFA counsel and AFA member companies and representatives. (attorney-client privilege; work product doctrine)

3. A. Communications among Sterling counsel and Sterling officers and employees. (attorney-client privilege; work product doctrine)

B. Communications among AFA counsel and AFA officers and employees. (attorney-client privilege; work product doctrine).

4. A. Communications relating to Sterling consultants. (work product doctrine).

B. Communications relating to AFA and other members' consultants. (work product doctrine)

5. A. Memoranda, minutes, agendas and notes (by and for counsel) of meetings between Sterling counsel, Sterling officers, employees and consultants related to ongoing or anticipated litigation. (attorney-client privilege; work product doctrine)

B. Memoranda, minutes, agendas and notes (by and for counsel) of meetings between AFA counsel, committees, officers or consultants. (attorney-client privilege; work product doctrine).

6. Drafts of studies, protocols, or unpublished material, and critiques of such material by non-consultant or non-employee academicians, including documents related to study design. (academic freedom privilege)

EXHIBIT 1

7. Correspondence and memoranda regarding government petitioning, association and speech. (Noerr-Pennington doctrine; First Amendment)

8. Other documents reflecting attorneys' mental impressions, opinions, consultants opinions and conclusions, etc., including drafts of letters, pleadings and handwritten notes and comments related to pending or anticipated litigation. (work product doctrine)

9. Communications among counsel for the Proprietary Asociation and its members, officers and consultants. (attorney-client privilege; work product doctrine)

10. Studies undertaken by Sterling or AFA in anticipation of litigation. (work product doctrine)

11. Miscellaneous (two documents).

AFFIDAVIT OF KATHRYN M. FORGIE

I, KATHRYN M. FORGIE, declare as follows:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California, and I am a partner with the law firm of Haight, Brown & Bonesteel, attorneys of record for defendant, GLENBROOK LABORATORIES, A DIVISION OF STERLING DRUG INC. I have been admitted pro hac vice to the courts of Wisconsin for the purposes of defending GLENBROOK LABORATORIES, A DIVISION OF STERLING DRUG INC., in the lawsuit of *Fox v. Sterling Drug Inc.* I am familiar with the instant case and have personal knowledge of the following facts, and if called to testify thereto at trial, could, and would, competently do so.

2. In my defense of STERLING DRUG in this case, and other cases on behalf of STERLING DRUG, I have written many letters to my client discussing various aspects of the cases, my impressions of the value of the cases, and my impressions and opinions as to how this case should be defended, and I have assembled information, legal theories and strategies as derived from interviews, statements, memoranda, correspondence, meetings with potential consultants and consultants, review of consultants' articles, briefs, legal and factual research, mental impression, personal beliefs and other tangible and intangible ideas, many of which have been included in these various letters and within the documents withheld by STERLING as privileged in this case and which are the subject of this motion.

3. In reviewing the documents for which STERLING has claimed privilege and which are the subject of this motion, I have reviewed many of the documents and have located in that review several documents which may serve as specific examples of the highly privileged nature of all the documents, generally. These examples include:

a. A letter written from me to an in-house attorney of STERLING, passing on information form a consultant and giving my opinion as to how such information should be monitored both within and without STERLING.

b. A document from an in-house attorney to another in-house attorney discussing which employee within the company would be best to testify with regard to certain regulatory matters and discussing how best to put forward STERLING'S position on various regulatory matters.

c. A memo form an in-house attorney to another in-house attorney, along with certain physicians and executives at STERLING, advising STERLING of his attendance at a regulatory hearing in which in-house attorney advises his client (STERLING) as to what action he thinks is appropriate and also gives his personal impressions of the hearing.

d. A letter from an outside attorney defending a different case allegedly involving aspirin and Reyes Syndrome to an in-house attorney at STERLING in which that attorney advises the attorney at STERLING with regard to contracting a particular consultant.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11th day of August, 1988, at Santa Monica, California.

/s/ KATHRYN M. FORGIE

KATHRYN M. FORGIE, Declarant

GENERAL ACKNOWLEDGMENT

State of California
County of Los Angeles } SS.

On this the 11th day of August 1988 before me, Lori Carlton the undersigned Notary Public, personally appeared /s/ Kathryn M. Forgie, personally known to me to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that she executed it. WITNESS my hand and offical seal.

/s/ LORI CARLTON
Notary's Public
OFFICIAL SEAL

AFFIDAVIT OF ROBERT L. KAUFMAN

I, Robert L. Kaufman, do declare and say as follows:

I am an attorney at law duly licensed to practice before all of the courts of he state of California, the United States District Court, for the Central District of California, the United States Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court. I am a partner in the law firm of Haight, Brown & Bonesteel, attorneys of record for defendant Glennbrook Laboratories, a division of Sterling Drug, Inc. I am familiar with the instant case and have personal knowledge of the following facts. I am fully competent to and do testify to the following.

In this matter plaintiff has sought discovery of various documents for which privileges have been claimed by the defendant. Previously, an index of those documents, which is the subject of this present motion, was supplied to the court and plaintiffs' counsel. For the convenience of the court, your declarant supplies the following identification of persons identified in those documents which are the subject of this motion:

IDENTIFICATION OF PERSONS IDENTIFIED IN PRIVILEGED DOCUMENTS

Acampora, Denise, Yale University Researcher

Aron, Steven, Deputy Medical Director for Sterling

Ballou, Banessa K., Senior Research Associate, Biometric Research Institute, outside consultants

Baril, Lynn A., Paralegal for Haight, Brown & Bonesteel, National Counsel for Sterling Drug

Baum, John, M.D., Monore Community Hospital, outside medical consultant for Sterling

Bonesteel, Michael J., National Council for Sterling Drug

Bruderle, Thomas P., Issues Manager of Aspirin Foundation of America

EXHIBIT 3

Byoir and Associates, Inc., public relations firm employed by AFA who were under the direction of Bruce Dickson.

Comas, Walter, President of Glennbrook Laboratories

Cannell, Charles F., Program Director, Institute for Social Research, University of Michigan, outside consultants.

Cannon, Patrick, National Counsel for Sterling Drug

Chaizze, Leonard, M.D., Director of Biostatistics and Epidemiology, Georgetown University School of Medicine, outside consultants.

Cornelius, William E., Director of Commercial Development, Dow Chemical

Crocker, John F.S., M.D., Outside Medical Consultant to Sterling

Darlak, M., Sterling Employee

DeSouza, Vice President - Administration, The Proprietary Association

Dickson, R. Bruce, Counsel for Aspirin Foundation of America

Dreyer, Nancy A., Epidemiological Resources, Inc., potential outside consultants to AFA

Dupler, Mitch, Counsel for Aspirin Foundation of America

Durso, John M., Sterling Employee

Elliott, R., Sterling Employee

Faulkner, Walter T., Sterling Outside Counsel

Felix, J.A., Sterling Employee

Forgie, Kathryn M., National Counsel for Sterling Drug

Forsyth, Brian, M.D., Yale University, outside consultant to AFA

Frisch, Irene, Sterling Librarian

Girsky, Howard, Byoir & Associates

Goldberg, Thomas R., Acting Director of Aspirin Foundation to America

Goldstein, George, M.D., Medical Director of Winthrop Laboratories

Goodman, Will [WG], Local Counsel for Sterling

Goodwin, Gary W., Executive Director, AFA

Hassing, G.S., Associate Director of Product Development, Procter & Gamble

Hickman, David H., Counsel for AFA

Hinds, Richard, Counsel for Aspirin Foundation of America

Hiross, Edward, Director of Drug Regulatory Affairs for Sterling

Homan, Herb, Scientific Associate of Sterling

Howritz, Ralph I., M.D., Yale University, outside consultant to AFA

Hurley, Frank, President of Biometric Research Institute, outside consultants to Sterling

Kelley, Terry, Director of Corporate Communications, Sterling

Ketchum Public Relations, employed by AFA and under the direction of Bruce Dickson

Kiefer, J.P., Sterling Canada

Kingham, Richard F., Outside Counsel for Sterling Drug

Klein, Robert, M.D., Darthmouth-Hitchcock Medical Center, outside medical consultant to Sterling

Kolojeski, John C., President, Clements Associates, Outside Consultants for Bristol-Meyers

Koob, Robert, Local Counsel for Sterling

Kops, Karin, Director of Corporate Communications, Science Exchange, Inc., potential outside consultants to AFA

Koslow, Marvin, Senior Vice-President, Bistol-Myers

Kuhlik, Bruce N., Outside Counsel for Sterling

Kule, C.A., Sterling International Legal Department

Kupper, Larry, M.D., Epidemiology Consultant from North Carolina

Lavey, Warren G., & Peltzan, S., Lexecon Inc., potential outside consultants to AFA

Lepow, Lee, Director of Sterling-Winthrop Research Institute

Leob, Jacqueline V., Executive Director, National Council on Drugs

Lorman, Alvin J., Associate General Counsel, The Proprietary Association

Luther, James H., Senior Vice President and General Counsel, Sterling Drug

Marshall, J.C., Sterling Employee

Maraschak, Margaret E., Director of Issues Management, Bristol-Myers

Mattimore, G.P., Sterling Employee

McClung, Juhling, M.D., Children's Hospital, Columbus, Ohio, Outside Medical Consultant

Melcher, Sam, President of Glenbrook Laboratories

Melley, Steve, Sterling Employee

Mills, Robin, President, Glenbrook Laboratories

Nielsen, Hank, Byoir & Associates, Inc., public relations firm for AFA under the direction of Bruce Dickson

O'Conner, Gerald T., Dartmouth-Hitchcock Medical Center, outside consultants to AFA

O'Keefe, Daniel F., Senior Vice President, General Counsel and Secretary, The Proprietary Association

Orlowski, James, M.D., Outside Medical Consultant

Ouellette, Bernie, Head of Pharmaceutical Group, Sterling

Pietrangelo, Michael A., Esq., Shearing-Plough

Pietruski, Jack, Chief Executive Officer, Sterling

Policano, Joseph D., Policano Incorporated, public relations firm for Sterling

Rodwin, Roger, Sterling Drug Inc. Attorney

Rosenberg, Frank, Director of Product Development Division at Sterling-Winthrop Research Institute

Smith, L.E., Sterling Employee

Soller, R. William, Director of Scientific Affairs, Sterling

Spooner, J.B., Medical Director, Sterling-Winthrop Group Ltd., England

Stander, herb, Head of Biometrics Department at Sterling-Winthrop Research Institute

Temko, Stanley L., Outside Counsel for Sterling Drug

Thaler, Michael, M.D., University of California, San Francisco, Outside Medical Consultant

Trout, Monroe, M.D., Corporate Vice President, Medical Director

Weiner, Ken, Vice President of Legal Affairs, Sterling

Wescoe, Clark, Chief Executive Officer of Sterling

Wiegard, Michael A., Counsel for Aspirin Foundation of America

Wilkerson, Gary, Esq., Plough, Inc.

Wilson, E. Royce, Corporate Research and Development, Procter & Gamble

Zander, Ernie, U.S. Medical Director, Sterling

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of August, 1988, at Santa Monica, California.

/s/ ROBERT L. KAUFMAN
Robert L. Kaufman

State of California
County of Los Angeles } SS.

On this 19th day of August, 1988, before me, Georgiana Nicholas, the undersigned Notary Public, personally appeared Robert L. Kaufman, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledge that he executed it. Witness my hand and official seal.

/s/ GEORGIANA NICHOLAS
Notary Public

RLK:td P981

OFFICIAL SEAL
GEORGIANA NICHOLAS
NOTARY PUBLIC • CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires Aug 24, 1990

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

JACQUELINE FOX, a minor, by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,
Plaintiffs,

v.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,
Defendants.

CONFIDENTIAL
FOR USE IN FOX
LITIGATION ONLY

Case No. 687-394

AFFIDAVIT OF KENNETH R. WEINER

Kenneth R. Weiner, being duly sworn, states as follows:

1. I am Assistant General Counsel for Sterling Drug, inc., defendant in the above action, and I make this affidavit in support of defendant's claim of privilege.

2. As Assistant General Counsel for Sterling Drug Inc., and Vice President of Glenbrook Laboratories, a Division of Sterling Drug Inc., I have responsibility for regulatory action and litigation concerning over-the-counter products manufactured by Sterling, including Bayer Aspirin. I have personal knowledge of the following:

EXHIBIT 4

3. Sterling became aware of a strong potential for litigation following the publication of the CDC MMWR, November 7, 1980, and its report of the surveys undertaken in the states of Ohio and Michigan. In fact, at least one lawsuit, filed subsequently, predates the publication of the MMWR.

4. Once contraversial studies are reported which potentially affect the safety of a product, it is a near inevitability that FDA review of such reports will become the subject of regulatory and products liability litigation as happened in this case. Therefore, following publication of the MMWR on November 7, 1980, Sterling considered that litigation was inevitable and would be substantial.

5. When Sterling was first informed of the summary results of the state surveys, it immediately began to assess the validity of said surveys, in part to determine their impact in the areas of aspirin safety, regulation, regulatory litigation, and potential products liability litigation. The initial assessment of the studies have undertaken for the most part by R. William Soller, Ph.D., and Herbert Stander, M.S., under the supervision of Monroe Trout, M.D., and at the direction of James H. Luther, General Counsel for Sterling.

6. A. The law firm of Covington and Burling was retained for the purpose of representing Sterling with respect to the legal aspects of the Reye's Syndrome/aspirin matter. Attorneys from Covington and Burling confidentially communicated with Sterling counsel and employees with respect to such representation, and communications relating to Reye's Syndrome are represented in Documents listed in the attached Exhibit "A."

B. Several lawsuits, identified in Sterling's Supplemental Response to Interrogatory No. 48, First Set, have been brought against Sterling for injuries claimed to be Reye's Syndrome allegedly caused by Bayer Aspirin. National coordinating counsel and local have been retained in these cases to represent Sterling, and documents

reflecting confidential communications to these attorneys, and/or these attorneys' opinions, conclusions, mental impressions, and investigations are contained in documents listed in the attached Exhibit "B."

7. Various Sterling personnel and both Sterling and outside attorneys communicated confidentially with me and other corporate counsel, for the purpose of providing information or responding to requests from counsel, related to anticipated or pending regulatory action and litigation. Communications from counsel were generated to these individuals for the same purposes. These communications are contained in documents listed in the attached Exhibit "C."

8. Among other things, in order to adequately respond to anticipated or pending regulatory action and litigation, Sterling employees hired outside consultants to assess the validity of the studies purporting to associate aspirin ingestion with the development of Reye's Syndrome, and to suggest other potential areas of inquiry into the alleged association. Confidential communications relating to such consultations are contained in documents listed in the attached Exhibit "D."

9. Certain confidential meetings were held between Sterling employees and counsel for the purpose of responding to anticipated or pending regulatory action and litigation. Documents relating to such meetings contain confidential communications to counsel and counsel's conclusions, opinions, and mental impressions, and are contained in documents listed in the attached Exhibit "E."

10. Sterling received confidential documents relating to proposed or ongoing studies or other academic or scientific endeavors which were provided confidentially prior to their publication, if any, and which were requested by the authors or providers to be kept confidential. These writings are contained in documents listed in the attached Exhibit "F."

11. There exist many documents in Sterling's files which contain the mental impressions, thoughts, conclusions and opinions of counsel, or investigations undertaken at the direction of counsel, related to anticipated or pending regulatory action and litigation. By way of example, these include, but are not limited to, drafts of letters, pleadings, and submissions in anticipated or pending regulatory action and litigation, as well as handwritten notes made by myself, in my capacity as Assistant General Counsel, related to anticipated or pending regulatory action and litigation. These writings are contained in documents listed in the attached Exhibit "G."

12. Certain studies were undertaken by Sterling or outside consultants in confidence, at the direction of counsel, related to anticipated or pending regulatory action and litigation. Confidential writings reflecting such studies are contained in documents listed in the attached Exhibit "H."

/s/ KENNETH R. WEINER
KENNETH R. WEINER

SUBSCRIBED AND SWORN
to before me this 10th
day of June, 1988.

/s/ PEGGY R. MILAEF
Notary Public in and for the
State of New York
OFFICIAL SEAL

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EXHIBIT "A"

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EXHIBIT "B"

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EXHIBIT "C"

004	232	253	267	290	310	328	351	376	398
018	234	254	269	291	311	329	352	379	399
215	237	255	273	293	312	331	358	380	400
216	238	256	275	294	313	332	360	381	403
217	239	257	277	296	314	334	361	382	629
218	240	258	278	299	315	335	362	385	650
221	242	259	279	300	316	336	363	388	1031
222	243	260	280	301	317	337	364	390	1035
223	244	261	281	304	318	338	366	391	1158
224	247	262	282	305	319	339	367	393	1180
225	249	263	284	306	320	346	368	394	
227	250	264	286	307	321	347	369	395	
229	251	265	287	308	322	348	371	396	
230	252	266	289	309	323	350	373	397	

EXHIBIT "D"

264	545
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526	557
527	558
528	559
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EXHIBIT "E"

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EXHIBIT "F"

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EXHIBIT "G"

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EXHIBIT "H"

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EXHIBIT "I"

Document No.

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STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

JACQUELINE FOX, a minor, by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,

Plaintiffs,

vs.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,

Defendants.

Case No. 687-394

AFFIDAVIT OF JAMES H. LUTHER

James H. Luther, being duly sworn, states as follows:

1. I am General Counsel and Senior Vice President for Sterling Drug Inc., defendant in the above action, and I make this affidavit in support of defendant's claim of privilege.

2. As General Counsel for Sterling Drug Inc., I have overall responsibility for regulatory action and litigation concerning all products manufactured by Sterling, including Bayer Aspirin. I have personal knowledge of the

3. Sterling became aware of a strong potential for litigation following the publication of the CDC MMWR, November 7, 1980, and its report of the surveys undertaken in the states of Ohio and Michigan. In fact, at least one lawsuit, filed subsequently, predates the publication of the MMWR.

4. Once controversial studies are reported which potentially affect the safety of a product, it is a near inevitability that FDA review of such reports will become the subject of regulatory and products liability litigation, as happened in this case. Therefore, following publication of the MMWR on November 7, 1980, Sterling considered that litigation was inevitable and would be substantial.

5. When Sterling was first informed of the summary results of the state surveys, it immediately began to assess the validity of said surveys, in part to determine their impact in the areas of aspirin safety, regulation, regulatory litigation, and potential products liability litigation. The initial assessment of the studies was undertaken for the most part by R. William Soller, Ph.D., and Herbert Stander, M.S., under the supervision of Monroe Trout, M.D., and at my direction.

6. A. The law firm of Covington and Burling was retained for the purpose of representing Sterling with respect to the legal aspects of the Reye's Syndrome/aspirin matter. Attorneys from Covington and Burling confidentially communicated with Sterling counsel and employees with respect to such representation.

B. Several lawsuits, identified in Sterling's Supplemental Response to Interrogatory No. 48, First Set, have been brought against Sterling for injuries claimed to be Reye's Syndrome allegedly caused by Bayer Aspirin. National coordinating counsel and local counsel have been retained in these cases to represent Sterling.

7. Various Sterling personnel and both Sterling and outside attorneys communicated confidentially with me

and other corporate counsel, for the purpose of providing information or responding to requests from counsel, related to anticipated or pending regulatory action and litigation. Communications from counsel were generated to these individuals for the same purposes.

8. Among other things, in order to adequately respond to anticipated or pending regulatory action and litigation, Sterling employees hired outside consultants to assess the validity of the studies purporting to associate aspirin ingestion with the development of Reye's Syndrome, and to suggest other potential areas of inquiry into the alleged association.

9. Certain confidential meetings were held between Sterling employees and counsel for the purpose of responding to anticipated or pending regulatory action and litigation.

10. Sterling received confidential documents relating to proposed or ongoing studies or other academic or scientific endeavors which were provided confidentially prior to their publication, if any, and which were requested by the authors or providers to be kept confidential.

11. There exist many documents in Sterling's files which contain the mental impressions, thoughts, conclusions and opinions of counsel, or investigations undertaken at the direction of counsel, related to anticipated or pending regulatory action and litigation. By way of example, these include, but are not limited to, drafts of letters, pleadings, and submissions in anticipated or pending regulatory action and litigation, as well as handwritten notes made by myself, in my capacity as General Counsel, related to anticipated or pending regulatory action and litigation. These writings are contained in documents listed in the attached Exhibit "I."

12. Certain studies were undertaken by Sterling or outside consultants in confidence, at the direction of counsel, related to anticipated or pending regulatory action and litigation.

/s/ JAMES H. LUTHER
James H. Luther

SUBSCRIBED AND SWORN
to before me this 10th
day of June, 1988.

/s/ PEGGY R. MILAEF

Notary public in and for the
State of New York
OFFICIAL SEAL

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

JACQUELINE FOX, a minor, by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,

Plaintiffs,

vs.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,

Defendants.

Case No. 687-394

AFFIDAVIT OF R. BRUCE DICKSON

R. Bruce Dickson, being duly sworn, deposes and says:

1. I am a member of the law firm of Paul, Hastings, Janofsky & Walker. I am a member of the bar of the State of New York and have been since 1973. I have been a member of the bars of the United States District Courts for the Southern and Eastern Districts of New York since 1973 and of the United States Court of Appeals for the Second Circuit since 1974. I also am and have been, since 1976, a member of the bars of the District of Columbia, the United States District Court for the District of Columbia,

EXHIBIT 6

and the United States Court of Appeals for the District of Columbia Circuit. I have been a member of the bar of the Supreme Court of the United States since 1977.

2. I submit this affidavit in opposition to plaintiffs' motion to compel the production of privileged documents in the possession of defendant Sterling Drug, Inc. ("Sterling"). This affidavit is based upon personal knowledge, except as it is expressly stated to be based on information and belief.

3. I have served as counsel to the Aspirin Foundation of America ("Aspirin Foundation" or "Foundation") since 1981. I have also served as counsel to members of the Aspirin Foundation on various matters since that time.

4. Sterling is a member of the Foundation. A representative of Sterling, Ken Wiener, was an Officer and Director of the Aspirin Foundation and a key member of the Foundation's Legal and Legislative Affairs Committee. Mr. Wiener frequently communicated with me in his capacity as a key Officer and Director of the Foundation, as well as in connection with his representation of Sterling. I frequently provided legal advice to Mr. Wiener in his capacity as Officer and Director of the Foundation, as well as in connection with his representation of Sterling.

5. I have been informed by counsel for Sterling that plaintiffs are seeking an order compelling the production of documents that have been withheld because their production would disclose either confidential communications protected by the attorney-client privilege or confidential attorney work-product protected by the work-product doctrine.

6. In order to assist the Court in evaluating the privilege that attaches to a number of documents pertaining to the Aspirin Foundation, this affidavit describes the circumstances surrounding the preparation of those documents.

7. The allegations that Reye's Syndrome is associated with aspirin use have resulted in confidential

communications between the Aspirin Foundation, its officers, directors and official representatives, and myself as legal counsel.

a. Some confidential communications were expressed to legal counsel by the Aspirin Foundation or its members for the purpose of obtaining legal advice. Such communications often were expressed at meetings or on conference calls of the Aspirin Foundation and are contained in minutes of such meetings and memoranda of such conference calls. Such communications also are contained in memoranda from counsel providing legal advice and discussing litigation-related strategy, and in drafts prepared by counsel, in response to such confidential communications.

b. Other confidential communications were expressed by legal counsel to the Aspirin Foundation or its members, either orally at meetings or on conference calls of the Aspirin Foundation, or in memoranda from counsel or in drafts prepared by counsel. Such communications contain legal advice, mental impressions, legal strategies and opinions of counsel expressed in anticipation of litigation or with respect to ongoing litigation.

c. Other confidential communications were expressed by consultants acting under the direction of counsel in anticipation of litigation or with respect to ongoing litigation. Such communications were expressed orally at meetings, on conference calls of the Aspirin Foundation, in memoranda from such consultants, or in drafts prepared by such consultants under my direction. Such communications reflect mental impressions and strategies expressed in anticipation of litigation or with respect to ongoing litigation. A number of such communications also contain

confidential information provided by the Aspirin Foundation or its members to counsel for the purpose of obtaining legal advice.

8. Among the litigation matters in which the Aspirin Foundation has been involved and which were the subjects of confidential communications described in paragraph 7 were the following:

a. *Public Citizen Health Research Group, et al. v. Hayes,* (No. 82-1346 (U.S. District Court for the District of Columbia).

i. This litigation, and its related adversarial administrative proceeding and related legislative activities, described below, actually began on March 9, 1982, with a citizens' petition filed with the Food and Drug Administration ("FDA") by Public Citizen Health Research Group ("HRG"), under the Federal Food, Drug and Cosmetic Act ("FDCA"), seeking a regulation regarding aspirin labeling.

ii. On May 17, 1982, HRG filed a civil action in the United States District Court for the District of Columbia seeking, *inter alia,* an order declaring that aspirin products were misbranded under the FDCA and compelling FDA to promulgate a rule regarding the contents of labels on aspirin products.

iii. Among the legal issues raised by the HRG litigation were:

- the sufficiency of certain surveys which purported to show an association between aspirin use for childhood chicken pox or flu and Reye's Syndrome;

- whether aspirin products which lacked a Reye's Syndrome warning were "misbranded" under the meaning of Section 331 of the FDCA, 21 U.S.C. § 331;

- whether FDA was legally obligated to issue a regulation requiring a Reye's Syndrome warning label on aspirin products;

- whether FDA had unlawfully delayed making a decision regarding labeling.

iv. On December 20, 1982, the Aspirin Foundation filed a motion for leave to intervene as a defendant in the *HRG v. Hayes* litigation, together with a memorandum and affidavit addressing issues of law and fact raised by the plaintiff in the litigation. On March 14, 1983 the District Court granted the Aspirin Foundation's motion for leave to intervene.

v. In 1984 and 1985, the District Court held a large number of status conferences for the purpose of monitoring the related administrative proceeding described below. I attended and reported to the court on behalf of the Aspirin Foundation at each of these status conferences.

vi. I have provided legal advice to and representation of the Aspirin Foundation in connection with this litigation. Materials filed in this action were prepared by me and other attorneys in my law firm or by consultants acting under my direction.

b. Department of Health and Human Services and Federal Trade Commission Administrative Proceedings.

i. On information and belief, the FDA and the Department of Health and Human Services ("Department"), of which FDA is a part, initiated an administrative proceeding to determine whether to require Reye's Syndrome label warnings during the spring of 1982.

ii. A public hearing was held as part of this administrative proceeding on May 24, 1982. Testimony was presented by state researchers, by FDA scientists, by HRG, and by the Aspirin Foundation and other industry representatives. Interested parties were given an opportunity to examine the researchers who presented testimony concerning their Reye's Syndrome research. I provided legal advice to and representation of the Aspirin Foundation in connection with this hearing.

iii. On December 28, 1982, FDA published an Advance Notice of Proposed Rulemaking in connection with this Reye's Syndrome administrative proceeding (Docket No. 82N-0158). On February 28, 1983, the Aspirin Foundation filed a brief commenting on the law and the facts in dispute in this rulemaking proceeding. The Aspirin Foundation's brief was prepared by me and by other attorneys in my law firm acting under my direction. The brief was accompanied by scientific and technical comments prepared by experts acting under my direction.

iv. On April 8, 1983, the Public Health Service requested further comments on research relevant to this administrative proceeding. The results of such research were expected to be used in connection with the HRG litigation

(described above) and the ongoing administrative proceeding, which was a part of the litigation. The Aspirin Foundation submitted comments on the research methodology and, in particular, on methodology necessary to produce results which would be legally sufficient to support a decision by FDA on this controversy. These comments were prepared by expert consultants working under my direction to assist in anticipation of litigation or in connection with ongoing litigation.

v. In 1983 as part of the on-going administrative proceeding, the Department engaged the Institute of Medicine ("IOM") to assist in designing the new research. At various times during 1983, 1984 and 1985, the IOM held hearings and received written comments relevant to the sufficiency of the study methodology. The Aspirin Foundation submitted comments on the proposed research methodology and, in particular, on whether the proposed methodology would produce results which would be legally sufficient to support a decision by FDA on this controversy. The Aspirin Foundation also submitted comments on the legal sufficiency of the preliminary results of the early research. These written and oral comments presented at IOM hearings, were prepared by me and by expert consultants working under my direction to assist in anticipation of litigation or in connection with ongoing litigation.

vi. On January 16, 1985, HRG filed a petition with the Federal Trade Commission ("FTC") seeking FTC action concerning aspirin advertising on the basis of allegations regarding Reye's Syndrome. I provided legal advice to and represented

the Aspirin Foundation in connection with this petition.

vii. On December 17, 1985, FDA published a proposed rule to require a uniform label warning about Reye's Syndrome on aspirin products (Docket No. 85N-0553). The Aspirin Foundation submitted comments on the proposed rule on January 15, 1986, addressing the legal and evidentiary basis for the proposal. Those comments were prepared by me and by other attorneys in my law firm acting under my direction.

viii. I have provided legal advice to and represented the Aspirin Foundation in connection with the above-described administrative proceedings, which were part of the HRG litigation described in paragraph 8. a. Materials filed by the Foundation in these proceedings were prepared by me and other attorneys in my law firm or by consultants acting under my direction in anticipation of litigation or in connection with ongoing litigation.

c. Related Federal and State Legislative Matters

i. During 1984 and 1985, the same issues being litigated in the HRG litigation were raised before the U.S. Congress and the Illinois legislature. On information and belief, this legislation was introduced at the request of HRG.

iv. I provided legal advice to the Aspirin Foundation and represented the Foundation in connection with these matters.

d. *Bunch v. Dow Chemical Co. et al.*, No. 82564 (Superior Court of the State of California, Butte County).

i. On November 15, 1983, a complaint was filed in the Superior Court of the State of California,

Butte County, alleging Reye's Syndrome-related personal injuries and naming, *inter alia*, the Aspirin Foundation as a defendant.

ii In the course of my representation of the Aspirin Foundation in this litigation, I and other attorneys of my firm acting under my direction have prepared and filed numerous pleadings and have otherwise provided legal advice to and represented the Aspirin Foundation in this litigation since 1984.

e. Other Litigation

i. I and other attorneys in my law firm acting under my direction have provided legal advice to and otherwise represented the Aspirin Foundation in connection with several other actions.

9. In connection with my services as legal counsel to the Aspirin Foundation, including the matters described in this affidavit, I have attended a number of meetings and conference calls of the Aspirin Foundation, its Board of Directors, and its committees. The discussions that took place at such meetings or conference calls have been summarized or described in minutes of meetings and memoranda describing conference calls. Each of these documents reflects confidential communications to legal counsel by the Aspirin Foundation and its Board members, officers, directors, and official representatives. The documents include both confidential information provided to legal counsel by the Aspirin Foundation and its members in connection with a request for legal services, including legal advice, and legal advice rendered by counsel based upon and incorporating such communications. The documents also reflect the mental impressions, legal strategies and opinions of counsel expressed in anticipation of litigation or in connection with ongoing litigation. Participants in these meetings and conference calls were limited

to Aspirin Foundation Board members, officers, directors and official representatives, and counsel, except that occasionally, participants also included consultants retained by counsel or by the Aspirin Foundation or its members and acting on behalf of the Aspirin Foundation and whose presence was necessary for the discussions, and other counsel for the Aspirin Foundation and/or Aspirin Foundation members. In one instance another member of the aspirin industry who was a co-defendant in the *Bunch* litigation, described above, participated in a meeting. Distribution of these documents was limited to these same individuals. The subjects of the confidential communications reflected in these documents are:

a. Ongoing or anticipated litigation, including federal regulatory proceedings and possible responses thereto by the Aspirin Foundation and its members.

b. State legislative and regulatory activity and possible responses thereto, including possible litigation, by the Aspirin Foundation and its members.

10. Other documents reflecting confidential communications between the Aspirin Foundation and its members and Aspirin Foundation legal counsel are contained in memoranda, correspondence and notes prepared by counsel to the Aspirin Foundation for the Aspirin Foundation and its members. Distribution of these documents was limited to Aspirin Foundation Board members, officers, directors, official representatives and counsel, except that distribution of some of these documents also included consultants retained by the Aspirin Foundation and its counsel and acting under the direction of counsel on behalf of the Aspirin Foundation and who had a need to review such documents in connection with their work for the Aspirin Foundation. Each of these documents reflects confidential communications between the Aspirin Foundation Board members, its officers, directors and official

representatives and Aspirin Foundation legal counsel. The documents include both information provided to counsel in connection with a request for legal services, including legal advice, and legal advice rendered by counsel based upon and incorporating such communications. The documents also reflect the mental impressions, legal strategies and opinions of counsel expressed in anticipation of litigation or with respect to ongoing litigation. The subjects of the confidential communications reflected in these documents were:

a. Ongoing or anticipated litigation, including federal regulatory proceedings and possible responses thereto by the Aspirin Foundation and its members.

b. State legislative and regulatory activity and possible responses thereto, including possible litigation, by the Aspirin Foundation and its members.

11. Draft pleadings, reflecting confidential information communicated by the Aspirin Foundation to its counsel in connection with a request for legal services, including legal advice, were prepared by Aspirin Foundation counsel, for possible filing with a court on behalf of the Aspirin Foundation and its members, and memoranda by counsel describing such drafts. Distribution of these drafts was limited to Aspirin Foundation Board members, officers, directors, official representatives and counsel. Distribution of certain drafts also included consultants retained by counsel or by the Aspirin Foundation and acting under the direction of counsel on behalf of the Aspirin Foundation. These drafts reflect confidential information communicated by the Aspirin Foundation and its members to Aspirin Foundation counsel in connection with a request for legal services, including legal advice. The documents also reflect counsel's legal advice to the Aspirin Foundation and its members and were intended to be kept confidential, except to the extent that they were embodied in final

versions of those pleadings that were actually filed with a court. These drafts also reflect the mental impressions, legal strategies and opinions of counsel expressed in anticipation of litigation or with respect to ongoing litigation.

12. Draft submissions, prepared by Aspirin Foundation counsel for possible filing with or presentation to federal agencies, Congress or state legislatures, reflect confidential information communicated by the Aspirin Foundation and its members to counsel in connection with a request for legal services, including legal advice. Distribution of these drafts was limited to Aspirin Foundation Board members, officers, directors, official representatives and counsel. Distribution of certain drafts also included consultants retained by counsel or by the Aspirin Foundation and acting on behalf of the Aspirin Foundation and under direction of counsel. These drafts reflect confidential information communicated by the Aspirin Foundation and its members to counsel in connection with a request for legal services, including legal advice. The drafts also contain counsel's legal advice to the Aspirin Foundation and its members and were intended to be kept confidential, except to the extent that they were embodied in final versions of those submissions that were actually filed. These drafts also reflect the mental impressions, legal strategies and opinions of counsel expressed in anticipation of litigation or with respect to ongoing litigation.

13. Draft submissions, prepared by consultants acting on behalf of the Aspirin Foundation and at the direction of Aspirin Foundation counsel, for possible filing with federal agencies, reflect confidential information communicated by the Aspirin Foundation and its members to Aspirin Foundation counsel in connection with a request for legal services, including legal advice. These documents were provided to Aspirin Foundation counsel for counsel's review in connection with counsel's legal advice to the

Aspirin Foundation. Distribution of these drafts was limited to Aspirin Foundation Board members, officers, directors, official representatives and counsel. Distribution of certain of these drafts also included consultants acting on behalf of the Aspirin Foundation and under direction of counsel. These drafts were intended to be kept confidential, except to the extent that they were embodied in final versions of those submissions that were actually filed with federal agencies. These drafts were prepared in anticipation of litigation or in connection with ongoing litigation.

14. Draft letters, prepared by Aspirin Foundation counsel, and comments thereon by the Aspirin Foundation and its members, for possible submission on behalf of the Aspirin Foundation in connection with the various matters described above or with anticipated litigation, contain or reflect confidential information communicated by the Aspirin Foundation and its members to Aspirin Foundation counsel in connection with a request for legal services, including legal advice. Distribution of these drafts was limited to Aspirin Foundation Board members, officers, directors, official representatives and counsel. Distribution of certain drafts also included consultants acting on behalf of the Aspirin Foundation and under the direction of counsel. These drafts also reflect legal advice to the Aspirin Foundation and its members and were intended to be kept confidential, except to the extent that they were embodied in final versions of those letters that were actually sent. These drafts also reflect the mental impressions, legal strategies and opinions of counsel expressed in anticipation of litigation or in connection with ongoing litigation.

15. Correspondence received by me from Aspirin Foundation consultants acting on behalf of the Aspirin Foundation and at the request of counsel, as well as my summaries of such correspondence, were intended to be

kept confidential and were prepared in anticipation of litigation or in connection with ongoing litigation. Distribution of these documents was limited to Aspirin Foundation members, officials and counsel.

16. Correspondence between Aspirin Foundation Board members and counsel to the Aspirin Foundation, together with my summaries of such correspondence, reflects confidential communications between the Aspirin Foundation and Aspirin Foundation counsel. Distribution of these documents was limited to Aspirin Foundation Board members, officers, directors, official representatives and counsel. The documents contain information provided to counsel in connection with a request for legal advice. The documents were prepared in anticipation of litigation or in connection with ongoing litigation.

/s/ R. BRUCE DICKSON
R. BRUCE DICKSON

Subscribed and sworn before me this 14th day of June, 1988.

/s/ DYAN S. OVERSTREET
NOTARY PUBLIC

My Commission Expires: 5/31/92

No document, no privilege asserted: 30, 40, 76, 79, 100, 101, 103, 130, 211, 220, 226, 228, 231, 233, 235, 236, 241, 245, 246, 270, 272, 276, 283, 285, 288, 292, 295, 297, 325, 326, 327, 330, 333, 340, 342, 343, 344, 345, 347, 349, 353, 354, 356, 357, 359, 365, 370, 374, 377, 378, 383, 387, 389, 392, 402, 419, 445, 459, 462, 467, 469, 470, 472, 475, 488, 489, 491, 493, 506, 510, 547, 549, 550, 581, 583, 584, 602, 608, 612, 613, 614, 618, 622, 623, 624, 626, 654, 655, 683, 735, 798, 813, 820, 823, 824, 842, 858, 859, 870, 879, 886, 917, 924, 1000, 1026, 1034, 1040, 1042, 1043, 1044, 1045, 1046, 1053, 1054, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1157, 1161, 1162, 1163, 1164, 1167, 1168, 1170, 1173, 1176, 1232, 1233, 1236, 1237, 1245, 1246, 1251, and 1254.

EXHIBIT 7

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

JACQUELINE FOX, a minor, by her Guardian ad Litem, Robert L. Habush, GARY FOX and JUDITH FOX,

Plaintiffs,

vs.

STERLING DRUG, INC., a Delaware corporation, ABC INSURANCE COMPANY, a fictitious corporation, RED CROSS PHARMACY, INC., a Wisconsin corporation, and DEF INSURANCE COMPANY, a fictitious corporation,

Defendants.

CASE NO. 687-394

DEFENDANT'S BRIEF IN SUPPORT OF PRIVILEGED DOCUMENTS

I.
BACKGROUND

Although plaintiffs apparently claim that evidence linking salicylates to the development of Reyes Syndrome dates back to 1962, the first studies purporting to epidemiologically "associate" aspirin with the onset of Reye's Syndrome, were published by the Centers for Disease Control (CDC) on July 11 and November 7, 1980. The reports of what came to be referred to as the Arizona, Ohio and Michigan studies caused CDC to state, despite, CDC's acknowledgment of the numerous limitations in the design and execution of these studies, that "parents should be advised to use caution when administering salicylates to treat children with viral illnesses, particularly chicken

pox and influenza-like illnesses." *Morbidity and Mortality Weekly Report* (MMWR), Vol. 29 [44]: November 7, 1980, at 539.

Following the MMWR publication, the controversy as to the validity of the association was discussed at all levels of society, including regulatory and administrative proceedings and litigation, in scientific journals and the lay media, and from corporate and government legal departments to civil courtrooms.

The plaintiffs' main theory in support of their argument that the documents withheld from discovery are not privileged is as stated in page 28 of their Brief in Support of Motion for a Contempt Order and Motion to Compel Discovery:

> "It is the plaintiffs, position that communications between Sterling Drug and its counsel concerning any reaction by Sterling Drug to the state epidemiological studies, the advisability of warnings on aspirin packages, or the relationship between aspirin use and Reye's Syndrome are not privileged, because they pertain primarily to business considerations and business judgment".

Plaintiffs, attempt to characterize such communications as relating to "business judgment," is either disingenuous or shows a limited understanding of the procedure whereby a pharmaceutical company ascertains the impact of reported adverse reactions to one of it products, in the areas of regulation and regulatory litigation and potential products liability litigation. Therefore, STERLING DRUG INC. (hereinafter "Sterling") will attempt to describe for the Court some of the salient events surrounding the aspirin/Reyes Syndrome controversy, so that the Court may better judge Sterling's claim of privilege within the appropriate historical context.

Upon receipt of the November 7, 1980, MMWR, Sterling's legal department anticipated substantial litigation following the CDC advisory, with respect to Food and Drug

Administration (FDA) regulatory review of the state studies, as well as product liability litigation. (See Affidavit of James H. Luther; Affidavit of Kenneth R. Weiner). In light of the pharmaceutical industry's experience with regulatory and product liability litigation following reports of "associations" with various products and their alleged adverse effects by CDC and other investigators, the probability of litigation was not "insubstantial," "remote," or a "mere possibility."

In anticipation of the inevitable and substantial litigation expected to ensue in the wake of the CDC advisory, James H. Luther, General Counsel for Sterling, requested that Monroe E. Trout, M.D. (Sterling's Medical Director) undertake an assessment of the validity of the state studies, so that the appropriate legal advice regarding regulatory action and litigation, and products liability litigation, could be given to Sterling. The assessment of the studies was undertaken for the most part by R. William Soller, Ph.D. and Herbert Stander, M.S., under the direct supervision of Dr. Trout. See Affidavit of James H. Luther; Affidavit of Kenneth R. Weiner.

It is clear that not only are communications between Sterling and attorneys retained in the products liability action privileged; so are communications between Sterling's legal department and those Sterling employees directed to assess the validity of the state studies. These communications were made for the purpose of rendering legal advice to Sterling, and as to those documents which have remained confidential, which relate to these communications, they are protected as attorney-client privilege and attorney work product. Similarly, communications by Dr. Soller and Mr. Stander with consultants, as well as documents related to these communications, are privileged.

As was anticipated by Sterling, there has been a substantial volume of litigation with respect to aspirin and Reye's Syndrome. As early as May 1982, The Public

Health Research Group (HRG) filed suit against Commissioner Hayes of the FDA, in the United States District Court of the District of Columbia, alleging that FDA had "unreasonably delayed in requiring the aspirin manufacturers to include with their aspirin products a warning of the association between Reye's Syndrome and aspirin based upon the state studies. *Public Health Research Group v Hayes, Commissioner, FDA* (D.D.C No. 82-1346) (*HRG v. Hayes*).

In addition to the internal review conducted by the Glenbrook Laboratories Scientific Department, Sterling has hired a number of lawfirms to represent its interest with respect to the aspirin/Reye's Syndrome matter, including national coordinating counsel for all product liability actions. The first products liability action against Sterling for alleged Reye's Syndrome following ingestion of Bayer Aspirin was filed in 1983, although one case subsequently filed against Sterling is based upon incidents which occurred in 1978, prior to the CDC publication. These lawsuits have been detailed in Sterling's responses to plaintiffs, interrogatories, and in each case along with national coordinating counsel, local counsel have been retained to represent Sterling.

Plaintiffs apparently misunderstand Sterling's relationship with The Aspirin Foundation of America, Inc. (AFA), in asserting that communications between Sterling and AFA counsel are not privileged. Plaintiffs, assertion is that the attorney-client privilege only extends to third persons with a common legal interest, and that, as before, the communcations related to "business decisions." Nothing could be further from the truth. As the attached Affidavit of R. Bruce Dickson states, he was counsel to the Aspirin Foundation, which included Sterling as one of its members. Thus, plaintiffs' "common interest" argument is misplaced; the analysis is identical to that which is undertaken when

assessing communications between a corporation and its outside counsel.

By way of background, the AFA was formed in 1981, as a trade association of several of the aspirin manufacturers and retailers. Although the Reye's Syndrome controversy was not an initial topic for consideration by the AFA, the nature of the controversy, as well as the common interests of the Foundations members, led to the Foundation responding to these items of common interest, in the public arena, regulatory sphere and in litigation. Indeed, the Aspirin Foundation successfully intervened as a party defendant in the *HRG v. Hayes* litigation, and remained active in that litigation throughout.

Within the rubric of *HRG v. Hayes*, as well as other litigation in which the Foundation was involved in, certain confidential communications were undertaken between Foundation members, consultants and counsel. These communications were undertaken for the purpose of obtaining legal advice regarding pending and potential litigation and representation before the federal government. (See Affidavit of R. Bruce Dickson.) These communications are thus protected attorney-client privilege and attorney work product.

II.

WORK PRODUCT OF AN ATTORNEY PREPARED IN ANTICIPATION OF LITIGATION IS PROTECTED FROM DISCOVERY.

Sec. (2) (c) stats., reads in relevant part as follows:

"Trial preparation: Materials. 1. subject to par.(d) a party may obtain discovery of documents and tangible things otherwise discoverable under par.(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the

> party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

In a recent Wisconsin case in which a plaintiff sued for the wrongful death of his wife and in the course of discovery sought the names and addresses of statementized witnesses, the court described a lawyer's work product as:

> "information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs and other tangible and intangible means." *Meunier v. Ogurek* 140 Wis.2d 782 at 785, 412 N.W.2d 155 at 159 (1987), quoting State ex rel. State ex.rel. *Dudek v. Circuit Court for Milwaukee County*, 34 Wis.2d 559 at 589, 150 N.W.2d 387 at 404 (1967).

The court then explains:

> "Work product is privileged information. As such, work product is not subject to discovery except 'where the objectives of pretrial are unnecessarily frustrated and where good cause is shown to make exception to the rule.' *Dudek* 34 Wis.2d at 591 150 N.W.2d at 405."

140 Wis.2d 782 at 785, 412 N.W.2d 155 at 159.

III.

FEDERAL DECISIONS CONSTRUING THE PROTECTION OF WORK PRODUCT AND OTHER LIMITATIONS TO DISCOVERY ARE PERSUASIVE IN WISCONSIN.

In the case of *Meunier v. Ogurek*, 140 Wis.2d 782, 412 N.W.2d 155 (1987), the court considered the protection from discovery of an attorney's work product. When

no Wisconsin decisions on point could be found the court stated:

> "Wisconsin's discovery rule is substantially identical to Fed.R.Civ.P. 26. Federal decisions construing the procedural counterparts to Wisconsin *Rules of Civil Procedure* are persuasive. *Wilson v. Continental Insurance Cos.*, 87 Wis.2d 310, 316, 274 N.W.2d 679, 682 (1979). Since no Wisconsin decisions have been cited to be on the issue, we review the federal decisions in point."
>
> 140 Wis.2d at 785, 412 N.W.2d at 159.

IV.

THE DOCUMENTS PREPARED IN ANTICIPATION OF LITIGATION ARE WITHHELD FROM DISCOVERY BECAUSE THEY ARE ATTORNEY'S WORK PRODUCT.

It has been held that:

> "a mere contingency that litigation may result is not determinative . . . the primary motivating purpose behind the creation of the document or . . . report must be to aid in possible future litigation. . . . there must be some articulable claim likely to lead to litigation." *In Binks Manufacturing Company v. National Presto Industries, Inc.*, 709 F.2d 1109 (7th Cir. 1983), citing *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982).

This is generally consistent with approaches taken by other courts, which have required that, at the time of the preparation of the work product material, litigation be "substantial and imminent" (see *Klawes v. Firestone Tire and Rubber Company*, 572 F.Supp. 116, 125 (C.D. Wis. 1983); *Carver v. Allstate Insurance Company*, 94 F.R.D. 131, 134 (S.D.N.Y. 1982); *APL Corporation v. Aetna Casualty and Surety Company*, 91 F.R.D. 10, 21 (D. Mo. 1980); *Miles v. Bell Helicopter Company*, 385 F.Supp. 1029, 1033 (N.D. Ga. 1974), or "fairly foreseeable" (see *Coastal States*

Gas Corporation v. Department of Energy, 617 F.2d 854 at 865 (D.C. Cir. 1980)).

Sterling did become aware of the strong potential for litigation following the publication of the CDC's Morbidity and Mortality Weekly Report (MMWR) dated November 7, 1980, where its report of the surveys undertaken in the states of Ohio and Michigan show a statistical association between Reyes Syndrome and aspirin ingestion. (Please see the affidavits of James H. Luther, Esq. and Kenneth R. Weiner, Esq.) In fact, such litigation did result following the Food and Drug Administration's decision not to require a change in labeling. That lawsuit was entitled *HRG v. Hayes* (filed May 1982). In addition, numerous personal injury product liability suits including the instant action, have been filed and served throughout the country.

The initial assessment of the state studies was undertaken by R. Williams Soller Ph.D. and Herbert Stander M.S. under the supervision of Monroe Trout M.D. at the direction of Sterling's general counsel James H. Luther. Documents reflecting communications by Dr. Soller and Mr. Stander to and through Dr. Trout were done in preparation of litigation and are protected under the work product doctrine. In addition, documents reflecting communications from consultants also hired to assess the state studies as well as proposed or ongoing studies or other academic or scientific endeavors which were provided confidentially are also protected under the work product doctrine.

In *Sterling Drug, Inc. v. Harris*, F.Supp. 1019 (S.D.N.Y. 1980) the court stated that:

> "To qualify for work product protection material must have been prepared 'with an eye to litigation.' (Citations omitted.)" 488 F.Supp. at 1026.

This case presents a somewhat analygous situation as in the instant action where litigation was held sufficiently anticipated to create a potential work product privilege. In *Sterling v. Harris* plaintiff brought the action to compel the

production of documents concerning the FDA's proposal to withdraw approval of a new drug application. The court found that litigation was first anticipated when the FDA discussed the possibility of withdrawing approval for the drug.

> "In this case, defendant's affidavits and the document themselves indicate that the FDA contemplated actual litigation concerning the withdrawal of Alevaire sometime in early 1969. The affidavit of Jerome L. Halperin, Deputy Director of the Bureau of Drugs, FDA, indicates that sometime in 1969, a decision to publish a notice of opportunity for hearing and proposal to withdraw for Alevaire was made. This notice was published on December 6, 1969, 34 Fed. Reg. 19389. Document 17, dated March 6, 1969, from the Acting Director of the Bureau of Medicine of the General Counsel, specifically discusses the proposal to withdraw approval of the NDA for Alevaire. The document discusses the sufficiency of the evidence supporting conclusions concerning the drug. It is reasonable to conclude, then, that the litigation involving the withdrawal of approval of Alevaire, which has extended over ten years, was first anticipated in early 1969 and that the work product privilege attached at that point. 488 F.Supp. 1026.

This defendant's anticipation of litigation following the CDC's published report on the state studies is at least as reasonable as the FDA's anticipation of litigation before they published a notice of opportunity for hearing and proposal to withdraw approval for Alevaire. This is a clear example of the routine expected by both industry as well as government with the possible change in the status of commercial drugs.

V.

THE ATTORNEY'S MENTAL IMPRESSIONS, CONCLUSIONS OR OPINIONS ARE SUBJECT TO A NEARLY ABSOLUTE IMMUNITY AND CAN BE DISCOVERED ONLY IN RARE AND EXTRAORDINARY CIRCUMSTANCES.

In litigation brought by the United States Government against drug producers, seeking to cancel a drug patent among other things, the court defined ordinary work product as:

> "that which does not contain the mental impressions, conclusions or opinions of the attorney."
> *In re Murphy*, 560 F.2d 326 at 334 (1977).

A The same court then described that work product that contains the mental impressions, conclusions, opinions or legal theories of an attorney as opinion work product and explained:

> "It is clear that opinion work product is entitled to substantially greater protection than ordinary work product. Therefore, unlike ordinary work product, opinion work product cannot be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternative means without undue hardship. See Fed.R.Civ.P. 26(b)(3). In our view work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. See *Hickman v. Taylor, supra.*"
> 560 F.2d at 336.

VI.

WORK PRODUCT PRIVILEGE APPLIES TO DOCUMENTS PREPARED IN ANTICIPATION OF LITIGATION SINCE TERMINATED.

In *In Re Murphy*, 560 F.2d 326 (1977), the court analyzed the policies underlying the decision of *Hickman v.*

Taylor, 329 U.S. 495 (1947), and then concluded that the work product privilege does apply to documents prepared in anticipation of terminated litigation. 560 F.2d at 334.

The court stated:

> "In determining whether the work product privilege extends to documents prepared in anticipation of previous, terminated litigation, we must look to the policies underlying the work product doctrine and attempt to define the intended scope of the doctrine. Our discussion must necessarily commence with *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), which, although it does not explicitly resolve the issue, establishes the analytical framework within which we must operate .... if unfettered scrutiny of an attorney's private files were allowed, attorneys would be reluctant to reduce their tentative opinions and thought processes to writing, a practice that would ill-serve clients and the cause of justice. Some restrictions on access to attorneys' work product are necessary to avoid [i]nefficiency, unfairness and sharp practices' in the delivery of legal services and to prevent a 'demoralizing' effect on the legal profession. 329 U.S. at 511, 67 S.Ct. 385 .... In view of the *Hickman* rationale and the policies of Rule 26(b)(3), we conclude that the work product privilege applies to documents prepared in anticipation of terminated litigation .... The work product privilege would be attenuated if it were limited to documents that were prepared in a case for which discovery is sought. What is needed, if we are to remain faithful to the articulated policies of *Hickman*, is a perpetual protection for work product, one that extends beyond the termination of the litigation for which the documents were prepared. Any less protection would generate the very evils that the court in *Hickman* attempted to avoid." 560 F.2d at 333 and 334.

Therefore documents considered prepared in anticipation of litigation arising out of the FDA's regulatory action such as *HRG v. Hayes* retain their work product protection.

VII.

WORK PRODUCT PRIVILEGE EXTENDS TO DOCUMENTS PREPARED IN PREVIOUS, UNRELATED LITIGATION.

The Seventh Circuit case of *In Re Murphy*, 560 F.2d 326 (1977), also considered the issue of whether the work product documents prepared in terminated litigation are protected from discovery only if they discuss issues that are closely related to the issues in the pending litigation. The court stated:

> "[H]owever, the court in *Duplan, supra*, 487 F.2d at 484 n.15, refused to allow this aspect of the work product privilege to rest on the 'technical touchstone' of relatedness. We agree with the conclusion in *Duplan*. If work product is protected in related, but not unrelated future cases, an attorney would be hesitant to assemble extensive work product materials because of the concern that the materials will not be protected in later, unrelated litigation. The unrelatedness of the subsequent litigation provides an insufficient basis for disregarding the privilege articulated in *Hickman* and incorporated in Rule 26(b)(3). . . . Our conclusion that the work product privilege extends to documents prepared in previous, unrelated litigation will not make attorneys' files impregnable."
> 560 F.2d at 335.

VIII.

THE WORK PRODUCT DOCTRINE PROTECTS MATERIAL PREPARED BY AGENTS FOR THE ATTORNEY AS WELL AS THOSE PREPARED BY THE ATTORNEY HIMSELF.

In the U.S. Supreme Court case involving the issue of whether the defense investigator could testify about his

interviews with prosecution witnesses and yet not produce the investigator's report, the court stated:

> "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation and our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect materials prepared by agents for the attorney as well as those prepared by the attorney himself."
> *United States v. Nobles*, 422 U.S. 225 at ___, 95 S.Ct. 2160 at 2170, 45 L.Ed.2d 141 at ___ (1975).

Mr. Luther and Mr. Weiner state that Monroe Trout M.D., R. Williams Soller Ph.D and Herbert Stander M.S. were charged with responsibility of investigation and assessment of the state studies. This work necessarily included communications regarding their work with consultants retained for the same purpose. Therefore, their confidential communications regarding their investigations and assessments are also protected under this rule.

IX.

THE CONFIDENTIAL COMMUNICATION BETWEEN A CLIENT OR HIS REPRESENTATIVE AND HIS LAWYER OR THE LAWYER'S REPRESENTATIVE IS CONSIDERED PRIVILEGE ATTORNEY CLIENT.

Sec. 905.03 stats., states in pertinent part:

"1. As used in this section:

a. a 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private, who has rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

> b. a 'lawyer' is a person authorized, or reasonably believed by the client to be authorized to practice in any state or nation.
>
> . . .
>
> d. a communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

2. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

> a. between himself or his representative and his lawyer or his lawyer's representative, or
>
> b. between his lawyer and the lawyer's representative, or
>
> c. by him or his lawyer to a lawyer to representing another in a manner of common interest, or
>
> d. between representatives of the client or between the client and representative of the client, or
>
> e. between lawyers representing the client."

X.

EMPLOYEES OF CORPORATION ARE CONSIDERED AS THE CLIENT

"In the corporation context, however, it will frequently be employees beyond the control group as defined by the court below – 'officers and agents – . . . responsible for directing [the company's] actions in response to legal advise' – who will possess the information needed by the corporation's lawyers. Middle-level-and indeed lower-level-employees can, by actions within the scope of

their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." *Upjohn Company v. United States* 449 U.S. 384 at ___, 101 S.Ct 677 at 683, 66 L.Ed.2d 584 at ___ (1981).

XI.

THE ATTORNEY-CLIENT PRIVILEGE PROTECTS THE ATTORNEY'S PROFESSIONAL ADVISE AS WELL AS THE CLIENTS INFORMATION TO THE LAWYER.

"... The privilege exists to protect not only the giving of professional advise to those that can act on it but also the giving of information to the lawyer to enable him to give sound and informed advise. *Upjohn v. United States*, 449 U.S. 391 at ___. 101 S.Ct. 677 at 683, 66 L.Ed.2d 584 at ___ (1981).

XII.

THE WORK AND STUDIES OF ACADEMICIANS ARE PROTECTED BY THE FIRST AMENDMENT.

In the Seventh Circuit case where a chemical company sought disclosure by administrative subpoena of the notes, reports and working papers and raw data relating to an animal toxicity study, the court found that:

> " 'Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.' *University of California Regents v. Bakke*, 438 U.S. 265-312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978)." *Dow Chemical Company v. Allan*, 667 F.2d 1262 at 1274 (7th Cir. 1982).

In *Dow Chemical Company*, the State of Wisconsin, appearing as amicus on appeal, argued that the dispute included the interests of academic freedom and argued that:

> "scholarly research is an activity which lies in the heart of higher education, that it comes within the First Amendment's protection of academic freedom, and that, therefore, judicially authorized intrusion into that sphere of university life should be permitted for compelling reasons . . . ." 672 F.2d at 1274.

The court went on to explain that:

> "Of course academic freedom, like other constitutional rights, is not absolute, and must on occasion be balanced against important competing interests . . . . What precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited." 672 F.2d at 1275.

The issue was again addressed by the Seventh Circuit Court of Appeals in the case where a defendant drug company attempted to obtain data gathered by a university registry which monitored disease of clear cell adenocarcinoma. In that decision the court stated:

> "This Circuit has expressly recognized that such an effect of premature publicity must be guarded against, in *Dow Chemical Company v. Allan* (citation omitted):
>
> > '[T]here are several reasons to think [subpoenas] . . . capable of chilling the exercise of academic freedom . . . [E]nforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies that the fruits of their labors have been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably anti-thetical to theirs. It is not difficult

> to imagine that the realization might well be both unnerving and discouraging . . . in addition, the researchers could reasonably fear that additional demands for disclosure would be made in the future . . . to these factors must be added the knowledge of the researchers that even inadvertent disclosure of the subpoenaed data could jeopardize both the studies and their careers.'
>
> Thus, indisputably, there is a vital public interest in promoting research of the type the registry carries out. We agree arguendo that the registry files may enjoy a qualified privilege and are not to be plied into unnecessarily; however, such privileges are not absolute. They must yield if to enforce them would produce a miscarriage of justice." *Deitchman v. E.R. Squibb and Sons, Inc.*, 740 F.2d 556 at 561, 562 (7th Cir. 1984).

XI.

THE NOERR-PENNINGTON DOCTRINE PROTECTS FROM DISCOVERY DOCUMENTS WHICH REFLECT ACTIVITIES OR COMMUNICATIONS MADE IN RELATION TO THE EXERCISE OF THE DEFENDANT'S FIRST AMENDMENT RIGHTS OF ASSEMBLY, ASSOCIATION AND PETITIONING THE GOVERNMENT.

It is well settled that activities engaged in to influence the decisions of public officials are constitutionally protected and, for that reason, cannot form the basis of a finding of violation of the federal anti-trust laws or *other laws*, regardless of the intent with which they are undertaken (*Eastern Ore President's Conference v. Noerr Motor Freight, Inc.*, 367 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). This principle has come to be known as the Noerr-Pennington Doctrine."

The scope of the Noerr-Pennington Doctrine is extremely broad and includes formal appearances before

courts, administrative agencies and general lobbying activity, including formal and informal presentations to legislators, regulatory agencies, the general public and private regulatory associations (*Noerr*, 36 U.S. at 529; *Pennington*, 381 U.S. at 1593; *California Motor Transport v. Trucking Unlimited*, 44 U.S. 508 (1972).

Although the Noerr-Pennington Doctrine was first enunciated in the anti-trust field, it has been held a bar to a broad range of causes of action where liability is sought to be based on protected lobbying, petitioning and assembly activity. (*Stern v. United States Gypsum, Inc.*, 574 F.2d 1329 (7th Cir. 1977); *Evers v. County of Custer*, 745 F.2d 1196 (9th Cir. 1984); *State of Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980). It is clear that this doctrine applies to trade associations. *Whelling-Pittsburgh Steel Company v. Allied Tube and Conduit Corp.*, 573 F.Supp. 833 (1983). It has also been held that this doctrine does apply to proceedings before the FDA, regarding approval of a drug. *Israel v. Baxter Laboratories*, 466 F.2d 272 (1972)

Not only is it impermissible to base liability on this protected activity, but no inference of liability may be drawn from evidence of this activity. *United States v. Johns-Manville Corporation*, 259 F.Supp. 440 (E.D. Pa. 1966). In that case the court refused to admit evidence of the defendant's promoting the adoption of particular specifications by state and local governments. The plaintiffs sought to draw from defendant's lawful lobbying the inference that defendant acted with sufficient predatory intent to establish an unreasonable restraint of trade. The court held that:

> "not only is it illogical to infer from evidence that [defendant] engaged in certain completely lawful conduct that it also engaged in other conduct which was unlawful, but it would seem that to draw such an inference in this case would be an infringement upon

> the defendant's First Amendment rights." 259 F.Supp. at 453.

The Noerr-Pennington Doctrine has been explicitly adopted by the 7th Circuit in *Weit v. Continental Illinois National Bank and Trust Company*, 467 F.Supp. 197 (E.D. Ill. 1978), where the court similarly refused to recognize an offer of evidence of joint lobbying, which plaintiffs have offered to support an inference of opportunity to conspire. The court noted:

> "The court has serious misgivings as to the propriety of relying on such evidence, in light of its minimal probative value as well as inevitable prejudicial effect on a jury." 467 F.Supp. at 207 n.22.

The Noerr-Pennington Doctrine arose to preserve important First Amendment rights and promote a variety of critical policies underlying those rights. *Noerr* itself bases application of the First Amendment on the recognition that failure to protect this conduct would discourage political activity and:

> "would substantially impair the powers of government to take actions through its legislature, an executive which operates restrained trade. In a representative democracy such as this, those branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends on the abilities of people to make their wishes known to the representatives." *Noerr*, 360 U.S. at 529.

The *Noerr* case views the unfettered participation in the First Amendment activities as absolutely necessary to the proper functioning of the government, particularly where the participant is an interested party. The effect in permitting discovery in the instant case would be to destroy the rights secured by the First Amendment by imposing a chilling effect on the exercise of First Amendment rights.

It is equally well established that there can be no discovery of documents relating to a parties petitioning activities with the government. *In Re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987); *Australia/Eastern/USA v. United States*, 537 F.Supp. 807 (D.D.C. 1982); *Britt v. Superior Court*, 20 Cal.3d 844, 574 P.2d 766, 143 Cal.Rptr. 695 (1978).

The question of *Noerr-Pennington* protection against civil discovery was addressed squarely in *Burlington*. In that case, a pipeline company brought an anti-trust action against various railroad companies, contending that these companies conspired to to prevent the construction of a pipeline by filing and defending lawsuits. The U.S. District Court held that the pipeline company couldn't discover documents related to the lawsuits. The Fifth Circuit reversed, holding that document prepared by the railroad companies in connection with lawsuits against the pipeline company were protected from discovery by the Noerr-Pennington Doctrine to the extent that these activities were genuinely intended to influence governmental action. In so holding, the appellate court stated that "[T]he district court erred in ordering discovery without considering whether the specific litigation activities were illegitimate . . . [In the sense that such activities were in and of themselves anti-competitive activity]." 822 F.2d at 525. The court added that "[T]o permit discovery of the documents withheld in this case as the basis of a larger conspiracy by the railroads would undermine the effectiveness of the very type of petitioning the Supreme Court's decisions had protected." 822 F.2d at 525.

In *Australia/Eastern/USA*, the court similarly concluded that in instances of government petitioning, "the first amendment should be balanced against the need for disclosure." 537 F.Supp. at 811. This court decided ultimately that discovery was permissible, but only because the petitioning activities involved foreign governments

while the Noerr-Pennington Doctrine applies only to petitioning activities made to U.S. government officials. The case thus stands for the proposition that any discovery in this context must be carefully balanced against the possibility that the discovery would chill a parties first amendment right to petition the government. As such, *Australia/Eastern/USA* is consistent with the Fifth Circuits opinion in Burlington.

The Supreme Court of California also has barred discovery of government petitioning activity. In *Britt v. Superior Court*, the court invalidated a discovery order that would have required a party seeking compensation for diminution and property values and personal injuries to answer certain deposition questions. Those questions concerned that parties participation in organizations that had petitioned the governments regarding the airports operations. The court held that the chilling effect such discovery would have on first amendment petitioning activities outweighs the truth-finding policy underlying discovery. The California Supreme Court further stated:

> "Indeed, in some respects, the threat to first amendment rights may be more sever in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." 20 Cal.3d at 857, 574 P.2d at 774, 143 Cal.Rptr at 703.

Therefore the defendant in the instant action submits that all documents that reflect petitioning activity on the part of Sterling or the AFA are protected from discovery.

Dated at Milwaukee for this 15th day of June, 1988.

Respectfully submitted,

By: /s/ RICHARD D. MOAKE
FRANK W. DOSTER, ESQ.
FIORENZA AND HODAN, S.C.
RICHARD D. MOAKE, ESQ.

Address:

5960 West Brown Deer Road
Milwaukee, Wisconsin 53223-2382
(414) 355-3600

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1691

In The

Supreme Court of the United States

October Term, 1988

STERLING DRUG, INC.,

Petitioner,

v.

CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE GARY A. GERLACH, JUDGE, PRESIDING, JACQUELINE FOX, A MINOR, BY HER GUARDIAN AD LITEM, ROBERT L. HABUSH, GARY FOX, AND JUDITH FOX,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN OR, ALTERNATIVELY, FOR A WRIT OF MANDAMUS

ROBERT L. HABUSH
HABUSH, HABUSH & DAVIS, S.C.
777 East Wisconsin Avenue
Suite 2200
Milwaukee, Wisconsin 53202
Telephone: (414) 271-0900

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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Sec. 804.01(2), Wis. Stats.

(2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * *

(c) *Trial preparation: materials.* 1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Sec. 808.03(1), Wis. Stats.

808.03 Appeals to the court of appeals. (1) APPEALS AS OF RIGHT. A final judgment or a final order of a

circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in ch. 799 cases or traffic regulation or municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

Sec. 809.10(4), Wis. Stats.

(4) MATTERS REVIEWABLE. An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.

Sec. 809.71, Wis. Stats.

809.71 Rule (Supervisory writ). A person may request the supreme court to exercise its supervisory jurisdiction over a court and the judge presiding therein or other person or body by filing a petition in accordance with s. 809.51. A person seeking a supervisory writ from the supreme court shall first file a petition for a supervisory writ in the court of appeals under s. 809.51 unless it is impractical to seek the writ in the court of appeals. A petition in the supreme court shall show why it was impractical to seek the writ in the court of appeals or, if a petition had been filed in the court of appeals, the disposition made and reasons given by the court of appeals.

Sec. 905.03(2), Wis. Stats.

905.03 Lawyer-client privilege.

* * *

(2) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

COUNTERSTATEMENT OF THE CASE

On page 9 of its petition for a writ of certiorari, the petitioner claims that in responding to the request of respondents Jacqueline Fox, Gary Fox and Judith Fox (hereinafter the "respondents") for production of documents, it asserted that 1,026 documents "were subject to (1) attorney-client privilege, (2) attorney work product privilege and/or, (3) first amendment privileges, including the right to associate and to petition the government." This is not an accurate statement.

The motion by the respondents which eventually culminated in the issuance of the circuit court order of November 10, 1988, was a motion to compel complete responses to a number of the respondents' discovery requests, including requests for production of documents, which motion was filed in September of 1987. A number of briefs and affidavits were subsequently filed, but it was not until approximately June 15, 1988, that the petitioner finally identified the nature of the privileges it

claimed with respect to the 1,026 documents. The petitioner filed a two-page document entitled "CATEGORIES OF PRIVILEGED DOCUMENTS," which listed eleven categories of documents as being privileged. (See A55-A56) Contrary to the assertion on page 9 of the petition for a writ of certiorari, the petitioner did not claim a First Amendment privilege with respect to all of the documents. First Amendment privileges were asserted only with respect to categories 6 and 7. The privileges asserted were the "academic freedom privilege" and the "Noerr-Pennington doctrine; First Amendment." (See A55-A56) The other documents were claimed to be protected from disclosure by the attorney-client privilege and the work product doctrine only.

The petitioner would have this Court believe that the privileged nature of all 1,026 documents is before the Court. In fact, no decision was made by the circuit court concerning the privileged nature of the documents in categories 1, 3-A and 5-A, and the circuit court did not order documents in those categories to be turned over to the respondents' counsel. Rather, the circuit court gave the petitioner another opportunity to demonstrate why the documents in those categories were protected from disclosure by the attorney-client privilege. (See A51-A52)

In discussing, on pages 7-8 of the petition for a writ of certiorari, the activities which it undertook subsequent to November 7, 1980, the petitioner would have the Court believe that the issue of whether the documents which were generated by the petitioner are privileged under the attorney-client privilege or the work product privilege is before this Court. In fact, in its petition, the petitioner has not disputed the determination of the circuit court that

the documents generated by it did not meet the requirements of those privileges. The only issues it has raised concern the privileged nature of (1) documents which evidence communications relating to the Aspirin Foundation of America ("AFA") and the Proprietary Association, which are documents in categories 2, 3-B, 4-B, 5-B, 9 and 10, and (2) documents regarding government petitioning, association and speech, which are documents in category 7. Any issue concerning the privileged nature of the documents in categories 1, 3-A, 4-A, 5-A, 6, 8 and 11 is not before this Court.

Although the circuit court ruled in its November 10, 1988 decision and order that the documents which it found to be non-privileged were to be turned over to the respondents' counsel on November 28, 1988, those documents were not actually provided to the respondents' counsel on that date. On the motion of the petitioner, the Wisconsin Court of Appeals issued a stay of the order for production, pending the disposition of the petition for leave to appeal which the petitioner had filed in that court. The petition for leave to appeal was denied on September 24, 1988. The circuit court subsequently set another date for the production of the non-privileged documents to the respondents' counsel. By order of the Wisconsin Supreme Court dated December 22, 1988, the production of the documents was again stayed, pending the disposition of the petition for a supervisory writ which the petitioner had filed in that court. In denying the petition for a supervisory writ, the Wisconsin Supreme Court vacated the stay of the circuit court order. (A28-A31) The petitioner then filed a motion in the circuit court for a stay of the enforcement of that court's order of

November 10, 1988, pending the filing and deciding of a petition for a writ of certiorari to this Court. In a hearing held on February 8, 1989, the circuit court denied the motion for a stay. The circuit court judge then took counsel for the parties into its chambers and showed them where the non-privileged documents were, and indicated that counsel could make their own arrangements for copying of the documents. The petitioner's counsel requested that he be given an opportunity to place a stamp on each of the documents to indicate that they were confidential and protected by the terms of the circuit court's protective order. After the documents were so stamped, they were taken by petitioner's counsel and respondents' counsel to respondents' counsel's office for copying on February 9, 1989. At no time between November 10, 1988 and February 9, 1989 did the petitioner or its counsel make any effort to prevent the physical production of the documents to the respondents' counsel. The petitioner did not inform the circuit court of any intention by the petitioner to disobey the court's order of November 10, 1988, and to thereby risk the imposition of a contempt order.

There is no support for the statement in footnote 1 of the petition for a writ of certiorari that the circuit court led the petitioner to believe that the documents which were submitted to the court for *in camera* inspection would be returned to the petitioner before any actual production. The circuit court did not engage in any deception or subterfuge, as the petitioner seems to imply. The circuit court never indicated at any time that it would return to the petitioner the documents which it determined to be non-privileged.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS NO JURISDICTION OVER THIS CASE.

The petitioner has asserted that this Court has jurisdiction over this case pursuant to 28 U.S.C. §1257 and 28 U.S.C. §1651. The petitioner has, however, failed to meet the requirements necessary to invoke the jurisdiction of the Court.

A. This Court Has No Jurisdiction Under 28 U.S.C. §1257.

The petitioner seeks the issuance of a writ of certiorari to review the decision and order of the circuit court dated November 10, 1988, pursuant to 28 U.S.C. §1257(a). In order for this Court to have jurisdiction to consider a petition for a writ of certiorari under that statute, a number of requirements must be satisfied. Those requirements are not met in this case.

1. No decision has been rendered by the highest court of the state.

Under 28 U.S.C. §1257(a), this Court can only review final judgments or decrees "rendered by the highest court of a State in which a decision could be had." It has been recognized by this Court that a litigant must exhaust all opportunities for review by the state courts before it will hear a matter. *Gorman v. Washington University*, 316 U.S. 98 (1942). To satisfy this requirement, the party seeking review must invoke the jurisdiction of the highest court in the state having either obligatory or discretionary power to review. *Sandquist v. California*, 419 U.S. 1066

(1974); *Banks v. California*, 395 U.S. 708 (1969); *McMaster v. Gould*, 276 U.S. 284 (1928); *Stratton v. Stratton*, 239 U.S. 55 (1915). This prerequisite is not satisfied where the highest court of the state refuses to review because a proper state appellate procedure was not observed. *Gotthilf v. Sills*, 375 U.S. 79 (1963); *Hammerstein v. Superior Court of California*, 341 U.S. 491 (1951).

In the case before the Court, the Supreme Court of Wisconsin refused to grant the petition for a supervisory writ which the petitioner had filed in that court because the proper state procedure set forth in sec. 809.71, Wis. Stats., had not been followed.

Sec. 809.71, Wis. Stats., provides that a person who requests the Wisconsin Supreme Court to exercise its supervisory jurisdiction must first file a petition for a supervisory writ in the lower appeals court. In this case, the petitioner failed to comply with that statute, because it failed to file a petition for a supervisory writ in the Wisconsin Court of Appeals before it filed its petition for a supervisory writ in the Wisconsin Supreme Court. The failure to comply with the statute was the sole basis for the Wisconsin Supreme Court's denial of the petition, as is clear from the following portion of that court's order dated February 1, 1989:

> On December 21, 1988 Sterling Drug, Inc. filed a petition seeking a supervisory writ prohibiting the circuit court for Milwaukee county, the Hon. Gary A. Gerlach, presiding, from enforcing its November 10, 1988 order requiring the petitioner to produce for inspection by an adverse party in litigation pending in that court certain documents the petitioner claims are privileged.

> The petitioner did not first seek supervisory relief in the Court of Appeals; rather, it petitioned the Court of Appeals for leave to appeal the trial court's discovery order. On December 14, 1988, having concluded that the petitioner failed to meet the criteria for permissive appeal, the Court of Appeals denied leave to appeal.
>
> * * *
>
> IT IS ORDERED that the petition of Sterling Drug, Inc., for a writ of prohibition is denied *ex parte*, pursuant to secs. (Rules) 809.71 and 809.51, Stats.

(A28-A29)

It is evident from the Wisconsin Supreme Court's order that the court refused to consider the merits of the petition for a supervisory writ because the petitioner had failed to properly invoke the jurisdiction of that court by utilizing the proper state procedure. Since the petitioner failed to properly invoke the jurisdiction of the Wisconsin Supreme Court, there is no decision of the "highest court of the state" from which the petitioner can seek review in this Court.

The AFA filed a petition for a supervisory writ in the Wisconsin Court of Appeals, and that petition was denied. However, the denial of the AFA's petition did not and could not excuse the petitioner from complying with the requirement of sec. 809.71, Wis. Stats. Nor would the denial of the AFA's petition have rendered futile the filing in that court of a petition for a supervisory writ by the petitioner. The AFA's petition addressed only the privileged nature of the AFA-related documents. The petition for a supervisory writ which the petitioner filed in the Wisconsin Supreme Court, however, addressed the privileged nature of all of the documents which were

ordered to be produced, not just the AFA-related documents. If the petitioner had filed a petition for a supervisory writ in the Wisconsin Court of Appeals, it would presumably have addressed the same issues which were addressed in the petition which it filed in the Wisconsin Supreme Court. Since that petition would thus have been broader in scope than the petition which the AFA filed, the Court of Appeals' denial of the AFA's petition would not necessarily have been determinative of the action that court would have taken on the petitioner's petition.

2. There is no final judgment.

The jurisdiction of this Court under 28 U.S.C. §1257(a) to review a decision of a state court depends upon the existence of a "final judgment or decree" by the highest court of the state. Even if this Court concludes that there has been a judgment of the highest court of the state of Wisconsin, it must be concluded that such a judgment is not final.

It is generally recognized that pretrial discovery rulings are not final, but are interlocutory in nature. *Alexander v. United States*, 201 U.S. 117, 121-22 (1906). The general rule is that a party not wishing to comply with a discovery order must refuse to comply with the order and risk being held in contempt before it may appeal or otherwise seek review of the order. *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States, supra.*

In this case, the petitioner did not refuse to comply with the circuit court discovery order. Rather, it obeyed

the terms of the order and turned over to the respondents' counsel all of the documents which the court had held to be non-privileged. Therefore, the order from which the petitioner seeks review is not a "final judgment" for purposes of 28 U.S.C. §1257(a), and the Court has no jurisdiction.

The petitioner attempts to invoke the jurisdiction of this Court by relying on exceptions to the rule prohibiting review of interlocutory judgments. None of these exceptions is applicable here.

a. The *Perlman* rule.

The petitioner's first contention is that this case falls within an exception created by *Perlman v. United States*, 247 U.S. 7 (1918). The *Perlman* rule provides that a discovery order is final for purposes of review or appeal whenever the order requires a third party to produce information or documents, and the third party cannot be expected to risk a contempt order merely to protect the aggrieved party's appeal rights.

The *Perlman* rule is inapplicable here. *Perlman* applies only if its application will prevent the disclosure of the information sought to be protected. If the information has already been disclosed, the reason for expedited review no longer exists. *Perlman* is thus inapplicable because the petitioner has provided the respondents with all of the documents found by the circuit court to be non-privileged.

Another reason the *Perlman* rule is inapplicable is that the circuit court order was not addressed to a third

party. Rather, it was addressed to the petitioner, who is a party in this case, and it required the petitioner to turn over to respondents' counsel documents which were generated by the petitioner.

The petitioner, however, asserts that the *Perlman* rule is applicable because the circuit court had possession of the documents after it conducted an *in camera* inspection of the documents to determine whether they were privileged. Apparently, the petitioner claims that the circuit court is a "third party" for purposes of the *Perlman* rule.

It cannot be concluded that a trial court who has possession of documents which are the subject of a discovery order is a third party in the context of the *Perlman* rule. The third party to which the *Perlman* rule applies must be a "stranger to the proceeding" before the court. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356 (1931). The court which issued the discovery order can hardly be considered a "stranger to the proceeding." Moreover, the *Perlman* rule provides that the discovery order must be directed to the third party. In this case, since the discovery order came from the court, it can hardly be considered as being directed to the court. Furthermore, the reasoning behind the *Perlman* rule does not support the application of the rule in this case. The reason for the rule is that if the Court were to deny review of a discovery order which is directed to a third party, then the aggrieved party would be left "powerless to avert the mischief of the order," in view of the fact that the third person could not be expected to risk a contempt citation in order to create for the aggrieved party an opportunity for review. *Perlman v. United States*, 247 U.S. at 13. Thus, the third person must be one who has the ability to resist

the discovery order, if he so desires, and be cited for contempt. In this case, the circuit court cannot be a third person for purposes of the *Perlman* rule, since the court could hardly be in a position to resist its own order and risk the issuance of a contempt citation by itself.

In this case, the petitioner could easily have resisted the production of the documents which were governed by the circuit court's order. Instead of doing so, it allowed the documents to be provided to respondents' counsel.

In relying on the *Perlman* rule, the petitioner also fails to take into account that this Court has allowed an exception to the principle of *Alexander v. United States* only "in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States v. Ryan*, 402 U.S. at 533. The usual application of the *Perlman* rule is where the aggrieved party's motion or petition is the only proceeding pending in any court. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 514 (1975); *Go-Bart Importing Co. v. United States*, 282 U.S. at 356; *Perlman v. United States*, *supra*.

However, the case before the Court is an ongoing civil case and the discovery order of which the petitioner seeks review is merely one step in that proceeding. Any unfair use of the documents which were ordered produced under the circuit court's order can be corrected on appeal from a final judgment in the case. If the appellate court determines that the documents are privileged, it can grant the petitioner a new trial and, to assure that no use of the documents is made on re-trial, the court can order the respondents' counsel to withdraw from representation of the respondents. Denial of immediate review

requested by the petitioner would not "render impossible any review whatsoever." *United States v. Ryan*, 402 U.S. at 533. Therefore, it must be concluded that the *Perlman* rule does not apply to render "final" the circuit court's discovery order in this case.

b. The collateral order doctrine is not applicable.

In addition to relying on the *Perlman* rule, the petitioner also attempts to establish jurisdiction under the collateral order doctrine. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). In order for this doctrine to apply, the interlocutory order must (1) conclusively determine the disputed question; (2) resolve an important issue separate from the merits; and (3) be effectively unreviewable on appeal from a final judgment. *Stringfellow v. Concerned Neighbors in Action*, ___ U.S. ___, 107 S.Ct. 1177, 1181-82 (1987), citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This Court has generally denied review of pretrial discovery orders. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *United States v. Ryan*, 402 U.S. 532. The collateral order doctrine is inapplicable, since the circuit court's discovery order is reviewable on appeal from a final judgment entered in this case.

In arguing that the collateral order doctrine is applicable here, the petitioner relies upon *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In that case, the Court identified four categories of cases in which jurisdiction is proper even when there are further proceedings anticipated in the state court. The only category into which the petitioner claims that this case falls is the third category. In that category are cases:

> [W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

420 U.S. at 481.

The instant case does not fit into this category. If this Court were to decline review at this time, and the petitioner were to subsequently lose this case on the merits, the Wisconsin Rules of Appellate Procedure would permit the petitioner to appeal, as of right, from the final judgment entered in this case and to raise, as of right, the issues which are presented to this Court. See secs. 808.03(1) and 809.10(4), Wis. Stats.

Relying upon *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), the petitioner asserts that this Court must take jurisdiction because if it does not, the documents will have lost their confidential status and the petitioner will be irreparably harmed.

The petitioner will not be irreparably harmed if this Court does not take jurisdiction. The documents which are at issue have already been provided to respondents' counsel, and the harm, if there is any, has already been done. Moreover, any harm which the petitioner has sustained by disclosure of the documents can be rectified on appeal from the final judgment entered in this case. If, on appeal, the documents are determined to be privileged,

the reviewing court will be compelled to grant the petitioner a new trial, and because the respondents' knowledge of the documents cannot be eradicated, the appellate court would have to order respondents' counsel to withdraw from representation of the respondents. Thus, the petitioner will be entitled to a new trial and that proceeding will be entirely unaffected by the earlier disclosure of the documents.

The petitioner claims that the production of the documents does not moot the questions presented here because there are other product liability cases similar to this case pending against the petitioner, and thus allowing discovery in this case could result in discovery in the other cases. To the contrary, however, production of documents in this case will have absolutely no affect upon any other case pending against the petitioner. The only order in this case which has addressed the issue of whether the documents are privileged is the circuit court order of November 10, 1988. The order has not been published and has absolutely no precedential value. Moreover, as the petitioner is well aware, there is a protective order in effect in this case which prevents the respondents, their counsel, their experts and other representatives from revealing any discovery documents or their contents to anyone who is not assisting respondents' counsel in the preparation of this case. (See A8-A11) Therefore, there is no chance that the documents or their contents will be revealed to any person who is unrelated to this litigation and, thus, production of the documents in this case will have no adverse affect upon the petitioner's defense of other similar product liability lawsuits.

The purposes of the requirement of 28 U.S.C. §1257(a) that this Court only review final judgments and decrees are well established, and include notions of avoidance of piecemeal review of state decisions, efficiency, judicial restraint and federalism. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). As evidenced by the cases cited above, this Court has consistently applied a strict test of finality to determine the reviewability of state pretrial discovery orders. If this Court were to accept jurisdiction of this case under the collateral order doctrine, then this would mean that any state court order compelling the discovery of documents claimed to be privileged would be reviewable, even if the documents were already produced to the opposing party. Such a result would seriously undermine the finality requirement.

3. There is an independent and adequate state ground supporting the state court's decision.

It is well-established that this Court will not review a judgment of a state court which rests upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Failure to abide by a state procedural requirement constitutes an adequate state ground, if the state has consistently and repeatedly enforced such requirement. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982); *Wolfe v. North Carolina*, 364 U.S. 177 (1960).

In this case, the Wisconsin Supreme Court never reached the merits of the petition for a supervisory writ which the petitioner had filed in that court, because the petitioner had failed to comply with the requirement of

sec. 809.71, Wis. Stats., that a person requesting the Wisconsin Supreme Court to exercise its supervisory jurisdiction must first file a petition for a supervisory writ in the lower appellate court. The Wisconsin Supreme Court did not reach any federal question, but denied the petition for a supervisory writ solely on the ground that the petitioner had failed to comply with sec. 809.71. There is nothing in the record which would indicate that the Wisconsin Supreme Court has not consistently and repeatedly enforced the requirements of sec. 809.71. Consequently, there is an adequate state ground for the Wisconsin Supreme Court's decision, and this Court has no jurisdiction to review that decision. What was said in *John v. Paullin*, 231 U.S. 583 (1913), is equally applicable here. There the Court stated:

> As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. . . . Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.
>
> * * *

> [I]t appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the Constitution and laws of the state. In short, the judgment of dismissal turned entirely upon a question of local law.

231 U.S. at 585-86. See also *Wolfe v. North Carolina, supra.*

When there can be no pretense that the state court sought to evade a constitutional issue, and the case was decided upon grounds unrelated to any federal question, this Court must accept the decision. *Wolfe v. North Carolina,* 364 U.S. at 195, citing *Nickel v. Cole,* 256 U.S. 222, 225 (1921).

4. The federal questions were not raised in or decided by the state court.

In order for this Court to have jurisdiction to review a state court decision pursuant to 28 U.S.C. §1257, it must affirmatively appear from the record that a substantial federal question was presented to the state court and was passed upon by that court. *Bankers Life and Casualty Co. v. Crenshaw,* ___ U.S. ___, 108 S.Ct. 1645, 1651-52 (1988); *Webb v. Webb,* 451 U.S. 493, 498-501 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

When the respondents moved the circuit court to compel production of the documents withheld by the petitioner, the petitioner argued that it was not required to produce those documents because they were privileged. The petitioner argued that the documents were privileged under the attorney-client privilege, the work product privilege, the academic freedom privilege and the *Noerr-Pennington* doctrine. In its order of November

10, 1988, the circuit court did not order the production of several documents which were claimed by the petitioner to be protected by the attorney-client privilege. Rather, because the petitioner had failed to specify its claim of privilege, the circuit court gave the petitioner another opportunity to establish that the documents it withheld were actually protected by the attorney-client privilege. (See A51-A52) With respect to other documents claimed by the petitioner to be protected by the attorney-client privilege, the trial court determined that those documents were not protected because they did not meet the requirements of the privilege. (See A42-A45) Similarly, many of the documents claimed to be protected by the work product privilege, with the exception of documents which were prepared in anticipation of specific litigation, were held not to be work product because they failed to meet the requirements of the work product doctrine. (See A47-A51) Other documents claimed by the petitioner to be protected by the academic freedom privilege and the *Noerr-Pennington* doctrine were ordered to be produced to the respondents, because Wisconsin does not recognize such doctrines and, in any event, the documents did not meet the requirements of those doctrines. (A53)

The petitioner now raises four issues for review by this Court. Essentially, those issues relate to the petitioner's First Amendment right to associate with other corporations, with other members of a trade association, with its own employees and selected expert consultants; the petitioner's right to due process of law; and the petitioner's First Amendment right to petition the federal government. With the exception of the issue concerning the petitioner's right to petition the federal government, none of the issues which the petitioner now raises was

ever raised in the circuit court. The petitioner never argued that if the circuit court were to order production of the allegedly privileged documents, that the court would violate the petitioner's right to associate or its right to due process. As is clear from the Defendant's Brief In Support Of Privileged Documents (See A98-A119), the only arguments which the petitioner presented in opposition to the respondents' motion to compel discovery were arguments that the documents met the requirements of the attorney-client privilege, the work product privilege, the academic freedom privilege and the *Noerr-Pennington* doctrine. With the exception of the petitioner's arguments concerning the academic freedom privilege and the *Noerr-Pennington* doctrine, no constitutional issues were ever raised. Therefore, this Court has no jurisdiction to consider any of the petitioner's arguments concerning its right to associate and its right to due process.

B. This Court Has No Jurisdiction Under 28 U.S.C. §1651.

The petitioner requests that this Court issue a writ of mandamus pursuant to 28 U.S.C. §1651. A writ can only be issued under that statute in aid of this Court's jurisdiction. As demonstrated above, this Court has no jurisdiction to consider the petition for a writ of certiorari. Therefore, it cannot issue a writ of mandamus.

Moreover, the remedy of mandamus is a drastic one to be invoked only in extraordinary situations. The party seeking issuance of a writ of mandamus must satisfy the burden of showing that his right to the issuance of a writ is clear and indisputable. *Kerr v. U.S. District Court For*

Northern District of California, 426 U.S. 394, 403 (1976). The petitioner has made no such showing in this case.

II. THE CIRCUIT COURT'S ORDER DID NOT IMPLICATE THE PETITIONER'S RIGHT TO ASSOCIATE WITH OTHER ASPIRIN MANUFACTURERS.

If the Court determines that it has jurisdiction, the petition for a writ of certiorari should be denied, because the petitioner has not raised an important federal question warranting review by this Court.

The petitioner's claim that the circuit court denied to the petitioner its First Amendment right to associate with other aspirin manufacturers has no support in the record. The circuit court was not asked to address any issue concerning the parameters of the petitioner's right to associate with other aspirin manufacturers. As discussed above, the petitioner made no claim in the circuit court that its First Amendment right to associate with other manufacturers would be violated if the circuit court were to order production of the documents evidencing communications by AFA members or representatives. The petitioner's only claim was that such documents were protected by the attorney-client privilege and the work product doctrine. (See A55-A56) The petitioner has no right to assert a First Amendment privilege as to such documents at this juncture.

Moreover, the decision and order of the circuit court does not deny, and cannot be interpreted to deny, the petitioner's right to associate with other corporations. The order does not in any way prohibit the petitioner from associating with other corporations, it does not impose liability upon the petitioner for its associational activities with other corporations, and it does not state or

imply that the communications among members of a trade association must always be disclosed in discovery proceedings or that the attorney-client and work product privileges do not apply to trade associations or their members. The circuit court applied the attorney-client and work product privileges in the same manner as those privileges would be applied in any case not involving a corporation or trade association, and held that the AFA-related documents were not protected from disclosure by either privilege, because the documents did not meet all of the requirements of those privileges. The basis for the circuit court's ruling that the AFA-related documents were not protected by the attorney-client privilege was the fact that the documents failed to meet the requirements of sec. 905.03(2), Wis. Stats., the Wisconsin attorney-client privilege rule, that (1) the communications between an attorney and client must be made "for the purpose of facilitating the rendition of professional legal services to the client," and that (2) the communications must be "confidential." (See A42-A45) The basis for the circuit court's ruling that the AFA-related documents did not constitute work product was the fact that the documents failed to meet the requirements of sec. 804.01(2)(c), Wis. Stats., the Wisconsin work product rule, that (1) the documents be "prepared in anticipation of litigation," and that (2) the documents be prepared "by or for [a] party or by or for [a] party's representative." (See A47-A51) The petitioner does not claim that the circuit court's application of the attorney-client privilege or the work product doctrine was erroneous.

Thus, the circuit court did not rule, as the petitioner seems to claim, that documents evidencing communications between corporate members of trade associations

are never protected from disclosure. The circuit court order only indicates that communications among corporations and members of trade associations, like communications among individuals, are not protected from disclosure in discovery proceedings unless they meet the requirements of an established privilege. In this case, they did not.

The petitioner is essentially arguing that requiring a corporation to produce documents which evidence communications with other corporations, but which fail to meet the requirements of any established privilege, violates the corporation's First Amendment right to associate. The petitioner claims that it has a First Amendment right to keep confidential every communication which it makes with another corporation or its representatives, regardless of the nature of the communication and regardless of whether the communication meets the requirements of an established privilege. This Court has never recognized that First Amendment rights are so broad. If the Court were to accept the petitioner's argument, the Court would be giving rights to corporations and associations which are greater than any rights which have been recognized with respect to individuals, since communications among individuals which do not meet the requirements of an established privilege are subject to disclosure. Moreover, if the Court were to accept the petitioner's argument, it would effectively abrogate the discovery rules. Under such a ruling, a corporate party, when requested in a discovery proceeding to disclose the substance of a written or oral communication with another corporation, would be entitled to prevent disclosure merely by claiming that the disclosure of the communication would violate its First Amendment right

to speak and to associate. Such a ruling would virtually eliminate any opportunity for meaningful discovery against a corporation, since a corporation could always insulate information from discovery merely by communicating the information to another corporation.

The petitioner asserts that the parties' only objective in this case is to prove or disprove the existence of a relationship between aspirin use and Reye's Syndrome. The petitioner thus claims that documents evidencing its assessment of the data concerning that relationship are irrelevant to this action, and that, therefore, the respondents should be denied access to such documents, since their desire to obtain such documents is based upon an ulterior motive.

The petitioner's view of this case is distorted. The respondents' obvious objective in this case is to prove liability on the part of the petitioner – to prove that the petitioner was negligent in failing to issue warnings of the relationship between aspirin use and Reye's Syndrome. Proving the existence and nature of that relationship is only one step in this process. In order to establish a claim for negligence, the respondents must also establish that the petitioner was aware of the risk that its product could cause Reye's Syndrome. One method of proving knowledge on the part of the petitioner is to obtain documents evidencing this knowledge. Therefore, documents showing the petitioner's assessment of the data concerning the relationship between Reye's Syndrome and aspirin use are highly relevant to the respondents' claims in this case.

Documents evidencing the petitioner's knowledge of the data are relevant to establish that it was foreseeable to the petitioner that children using aspirin had a risk of

developing Reye's Syndrome. Documents evidencing the petitioner's assessment of the data and activities which the petitioner undertook in response to the data are relevant to establish negligence on the part of the petitioner. Such documents are also relevant as showing admissions on the part of the petitioner that there is a causal relationship between aspirin use and Reye's Syndrome and admissions of negligence on the part of the petitioner.

The respondents do not wish to obtain access to the documents for the mere purpose of eavesdropping on the petitioner and its corporate associates, but to obtain evidence which is relevant and necessary to prove liability on the part of the petitioner. Permitting the respondents to discover non-privileged documents evidencing the knowledge of and communications by the petitioner for the purpose of establishing liability of the petitioner does not offend the First Amendment.

III. THE *NOERR-PENNINGTON* DOCTRINE IS COMPLETELY INAPPLICABLE TO THIS CASE.

The petitioner's claim that this Court should accept review of this case to define the parameters of the *Noerr-Pennington* doctrine is without merit. The doctrine, which was developed in the anti-trust context, generally applies in cases where liability is sought to be imposed on the basis of lobbying and petitioning activities. It is completely inapplicable in this case.

Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and their progeny essentially hold that an anti-trust violation cannot be predicated upon efforts to influence the government to pass or enforce laws, to influence administrative agencies to take

certain action, or upon actions in the courts, even though such efforts are designed to injure competitors.

Clearly, the *Noerr-Pennington* doctrine is inapplicable to this case, since this is not an action in which the respondents have alleged that the petitioner violated the Sherman Act, laws against unfair trade practices, laws against conspiracy or similar laws. Nor are the respondents attempting to impose liability on the petitioner on the basis of its lobbying or petitioning activities. The respondents are merely claiming that the petitioner is liable for its failure to issue a warning concerning the association between aspirin use and Reye's Syndrome.

Moreover, even if the respondents were attempting to impose liability on the petitioner for its lobbying and petitioning activities and the *Noerr-Pennington* doctrine were arguably applicable, the application of that doctrine would not absolutely preclude the discovery sought by the respondents. In *United Mine Workers v. Pennington*, 381 U.S. at 670, n. 3, this Court made clear that evidence of *Noerr* conduct may be introduced at trial, at the discretion of the trial judge, to show the purpose and character of other conduct. This Court stated:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the established judicial rule that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends to reasonably show the purpose and character of the particular transactions under scrutiny.

This rule is controlling in this case. Under that rule, the respondents would be entitled to offer evidence of the petitioner's lobbying or petitioning activities as evidence

to support their allegations of a continuing course of outrageous conduct on the part of the petitioner of which such activities were just one small part. Accordingly, the respondents cannot be absolutely precluded from discovering any information concerning the petitioner's petitioning or lobbying activities.

The petitioner has cited no case to this Court in which the *Noerr-Pennington* doctrine was applied to discovery proceedings in a products liability action. In an effort to convince the Court that the doctrine should apply in the context of this case, the petitioner cites three lower court cases which, the petitioner states, have held that there can be no discovery of documents relating to a party's petitioning activities with the government. The three cases cited by the petitioner, none of which is a products liability case, are inapposite. *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), and *Australia/Eastern/USA v. United States*, 537 F.Supp. 807 (D.D.C. 1982), were both anti-trust cases. *Britt v. Superior Court of San Diego County*, 20 Cal.3d 844, 574 P.2d 766, 143 Cal.Rptr. 695 (1978), did not involve the application of the *Noerr-Pennington* doctrine, but rather, involved the rule of *NAACP v. Alabama*, 357 U.S. 449 (1958), recognizing constitutional protection of anonymity of affiliation, which is not involved in this case.

Of the 1,026 documents which were claimed by the petitioner to be privileged, only 14 were claimed to be protected from disclosure by the *Noerr-Pennington* doctrine. Counsel for the respondents have read the documents and they are of no real significance. Their production certainly does not warrant review by this Court merely on the unsubstantiated claim by the petitioner that the *Noerr-Pennington* doctrine applies to them.

IV. THE PETITIONER'S REQUEST FOR THE ESTABLISHMENT OF CONSTITUTIONAL BOUNDARIES FOR DISCOVERY PROCEEDINGS IN PRODUCT LIABILITY LITIGATION IS WITHOUT SUPPORT.

The petitioner's request for the establishment of boundaries for discovery proceedings in multi-party product liability litigation has no basis in the Constitution.

Discovery proceedings in multi-party product liability litigation, like any other civil litigation, are governed by rules set up by the individual courts. There is no reason for this Court to question the application of those rules, unless the application somehow offends the Constitution.

In this case, the circuit court ordered production of many of the documents withheld by the petitioner, because the circuit court determined that the documents failed to meet the requirements of the attorney-client privilege or the work product privilege. The petitioner has not claimed in this Court that the circuit court was incorrect in concluding that the documents failed to meet those requirements. Rather, what the petitioner apparently claims is that when the application of state discovery rules, as limited by the attorney-client and work product privileges, in multi-party product liability litigation results in a conclusion that the manufacturer must produce information which it desires to keep from the hands of its adversary, such application offends the Constitution.

The petitioner claims that the application of discovery rules to a manufacturer in mass product liability litigation prevents the manufacturer from speaking freely,

because the manufacturer's communications may be disclosed to victims of its defective products. The petitioner requests this Court to somehow recognize a new privilege on behalf of product manufacturers to prevent their adversaries from ever discovering any of the manufacturers' communications about their products, so as to prevent the victims from ever proving the manufacturers liable for injuries caused by those products. This request has absolutely no support in the Constitution and certainly does not warrant review by this Court.

CONCLUSION

This Court has no jurisdiction over this case under 28 U.S.C. §1257(a) or 28 U.S.C. §1651. There is no constitutional basis for the recognition of a privilege on behalf of a product manufacturer to preclude disclosure, in discovery proceedings, of communications made to its representatives or other manufacturers about its product, when those communications fail to meet the requirements of an established privilege.

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. HABUSH

HABUSH, HABUSH & DAVIS, S.C.
Attorneys for Respondents, Jacqueline Fox, Gary Fox and Judith Fox

777 East Wisconsin Avenue
Suite 2200
Milwaukee, WI 53202-5381
[414] 271-0900